

(24,824)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 541.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

JAMES T. HORTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

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1 In the Supreme Court of North Carolina, Spring Term,
1915.

No. 257.

JAMES T. HORTON
vs.
SEABOARD AIR LINE RAILWAY.

Petition for Writ of Error.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Your petitioner, Seaboard Air Line Railway, a corporation of the State of Virginia, North Carolina and other states, respectfully shows:

This was a suit brought by James T. Horton, an employee of the Seaboard Air Line Railway, to recover damages for personal injury under the Federal Employers' Liability Act, enacted by Congress of the United States, April 22, 1908, and the amendments thereto.

At the trial in the Superior Court of Wake County, issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. "Yes."

2. If so, did the plaintiff assume the risk of injury?

Answer. "No."

3. Did plaintiff, by his own negligence, contribute to his injury?

Answer. "No."

4. What damages, if any, is the plaintiff entitled to recover?

Answer. "\$4,500."

From the judgment rendered upon said verdict in favor of the plaintiff for the sum of \$4,500.00 and the costs of the action, defendant appealed to the Supreme Court of North Carolina:

2 That the Supreme Court of North Carolina, which is the highest Court in the State of North Carolina, in which a decision in the said action could be had, at the February Term, 1914, of said Court, to-wit, on the 12th day of May, 1915, rendered judgment adverse to this petitioner, and affirming the judgment of said Superior Court of Wake County.

That in the proceedings had and judgment rendered, certain errors were committed to the prejudice of the petitioner, all of which more fully appears in the assignment of errors filed herewith.

That the cause of action set forth in the complaint and defense thereto set up in the answer of the plaintiff in error, arose under the statutes of the United States, to-wit the act regulating, governing and controlling the liability of a railroad engaged in interstate commerce to an employee who receives an injury or is killed while em-

ployed in such commerce, approved by Congress, April 22, 1908, and usually referred to as the Federal Employers' Liability Act.

That the errors complained of in this petition, and more fully set forth in the assignment of errors accompanying this petition, are, that the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the Federal Employers' Liability Act in that instructions to the jury were given which were objected to by your petitioner, which denied your petitioner the constructions of said act, to which it was entitled, and in that your petitioner's motion for judgment of nonsuit was denied, and that incompetent evidence was admitted over petitioner's objection and exception, and your petitioner was in other ways in the trial of said action deprived of its rights under said Federal Employers' Liability Act, as more fully appears in the assignment of errors filed herewith.

Therefore, considering itself aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in the above entitled case, your petitioner hereby prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correction of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States, and that the decision and judgment of the Supreme Court of North Carolina may be reversed and annulled.

Assignment of Errors herewith filed.

SEABOARD AIR LINE RAILWAY, [SEAL.]

By MURRAY ALLEN,

Attorney for Seaboard Air Line Railway.

STATE OF NORTH CAROLINA, ss:

Let the writ of error issue upon the execution of a bond by the Seaboard Air Line Railway in the Sum of Seven Thousand Dollars; such bond when approved to act as a supersedeas. Dated June 23, 1915.

WALTER CLARK,

Chief Justice Supreme Court of North Carolina.

4 In the Supreme Court of North Carolina, Spring Term, 1915.

No. 257.

JAMES T. HORTON

vs.

SEABOARD AIR LINE RAILWAY.

Assignment of Errors and Prayer for Reversal.

This is an action brought by James T. Horton against Seaboard Air Line Railway to recover damages for personal injury received

by the explosion of a water glass on an engine on the line of railroad of the Seaboard Air Line Railway, while he was employed on one of the freight trains of said Railway as an engineer. It was alleged in the complaint and admitted by the defendant that at the time of said explosion of the water glass and injury to the plaintiff, both the defendant and plaintiff were engaged in interstate commerce, and plaintiff brought his action specifically under the Employers' Liability Act, passed and approved by the Congress of the United States on the 22nd day of April, 1908, and the amendments thereto. The evidence also established facts sufficient to bring the action within the provisions of said Act.

Now comes the Seaboard Air Line Railway, plaintiff in error, and files herewith its petition for writ of error and says that there are errors in the record and proceedings in the above entitled cause, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments of error:

1. For that the Supreme Court of North Carolina erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on the 22nd day of April, 1908, especially in the construction of Sections 1, 3, 4 and 5.

2. For that by these errors the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the said statute and denied to your petitioner a correct construction, interpretation and application of the provisions of said statute.

3. For that the Supreme Court of North Carolina committed error in sustaining the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the Federal Employers' Liability Act, approved by Congress, April 22nd, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

4. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22nd, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 1. of said Act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

5. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by your petitioner under Section 1 of the said act of Congress, because of the holdings of the Supreme Court of North Carolina in construing certain instructions given and refused upon the first issue submitted to the jury, to-wit: Was the plaintiff injured by the negligence of

the defendant as alleged in the complaint, which said errors are hereinafter more particularly set forth.

6 For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 4 of the said Federal Employers' Liability Act, approved by Congress of the United States on April 22nd, 1908, because of the holdings of the Supreme Court of North Carolina, because of certain instructions given and certain requests for instruction by plaintiff in error, which were refused, and because of certain incompetent evidence admitted upon the second issue submitted to the jury, to-wit: If so, did the plaintiff assume the risk of injury? which said errors are hereinafter more particularly set forth.

7 For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act approved by Congress of the United States, April 22, 1908, because of the holdings of the Supreme Court of North Carolina in construing this act and because of certain instructions given and certain requests for instruction by plaintiff in error, which were refused, upon the third issue submitted to the jury, to-wit: Did the plaintiff contribute to his injury by his negligence as alleged in the answer? which said errors are hereinafter more particularly set forth.

8 For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

"I told Powie Matthews that the guard glass was gone, and asked if he had any of them. He was the day roundhouse foreman and he said no, they did not have any here."

This is defendant's Exception No. 1.

9 For that the Supreme Court of North Carolina erred in permitting plaintiff, J. T. Horton, over defendant's objection and exception to testify that defendant's roundhouse foreman told him, "No, they did not have any (guard glasses) here (in Raleigh)."

7 This is defendant's Exception No. 2.

10 For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. What did you say to Powhatan Matthews?

Objection by defendant.

By the Court: To any statement as to the water glass, the defendant objects. Objection overruled.

Defendant excepts.

This is defendant's Exception No. 3.

11 For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of the plaintiff, J. T. Horton, over defendant's objection and exception.

Q. State to the jury why you ran that engine out on the second trip without the guard glass in, Mr. Horton.

A. Because I was promised I would have a guard glass when I returned, Mr. Matthews told me, and I was told to run her and I had to do it.

This is defendant's Exception No. 4.

12. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in referring to the answer to the foregoing question, making the following statement and admitting testimony of plaintiff, J. T. Horton, as follows:

By the Court: Strike out what he was promised by Matthews, that part of it is stricken out, as that was a conclusion. You can say I ran it because of the conversation I had with Matthews.

A. That is right.

By the Court: All of the answer is stricken out and I will permit him to say I ran it on account of the conversation with Matthews.

Objection by defendant. Objection overruled.

Defendant excepts.

8 This is defendant's Exception No. 5.

13. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. I will ask you this question: State to the jury whether you in your present condition in respect to the sight of your right eye are able or capable to operate a locomotive engine?

A. No.

This is defendant's exception No. 6.

14. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Why?

A. On account of the condition of my right eye, impaired eye sight.

This is defendant's Exception No. 7.

15. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. What reply did they make to you, if any?

Objection by defendant.

By the Court: It is not a question of the reply, but whether he could secure employment.

By Mr. Douglass: State, Mr. Horton, if you failed to get employment with the Seaboard Air Line Railway on account of the condition of your eye sight.

Objection by defendant. Objection overruled.

Exception.

A. Yes.

This is defendant's Exception No. 8.

9 16. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. You said something about handing in a large list of repairs to be done to the engine on the day before this injury to your eye?

A. Yes.

Q. Did they do the work?

A. Not a bit of it. I believe they did open the sand pipes.

This is defendant's Exception No. 9.

17. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Was it your duty under the rules of this company to put the missing gauge glass on that work report?

A. All that is necessary is to get a requisition and put it in.

This is defendant's Exception No. 10.

18. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Was that repair within the rule requiring it to be in writing?

A. No, it is a supply.

This is defendant's Exception No. 11.

19. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

10 Q. Is there any rule requiring a written report for a supply?

A. No.

This is defendant's Exception No. 12.

20. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception, and making the following statement:

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass?

Objection by the defendant. Objection sustained for the reason that this has been — over on both the direct and cross examinations.

By Mr. Simms: Does your Honor understand that it is in the record that it is more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the Court: Yes, he said that, because they would stop up.

This is defendant's Exception No. 13.

21. For that the Supreme Court of North Carolina erred in hold-

ing that the trial court did not commit error in admitting and refusing to strike out the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. The Court says you may explain why you told Mr. Burrus you did not report that guard glass for reasons best known to yourself.

11 A. He asked me why I did not put it on my work report and the reason was because I had been to some one higher than him and he said he did not have any. Mr. Matthews was higher than—over Mr. Burrus.

This is defendant's Exception No. 14.

22. For that the Supreme Court of North Carolina erred in upholding the trial court in the refusal to strike out the foregoing testimony upon defendant's motion.

This is defendant's Exception No. 15.

23. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in permitting the plaintiff, James T. Horton, to be recalled and testify as follows:

Q. State to the jury what you meant in your cross examination by saying that you could run an engine as good as you ever could?

A. I meant I knew as much about an engine mechanically as I ever did, but I could not see to run it.

This is defendant's Exception No. 16.

24. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony by plaintiff's witness, Dr. W. C. Horton, over defendant's objection and exception:

Q. When he went up there for examination, he told you how his eye got hurt?

A. I think he did. I don't remember what he said, but it seems to me it was an explosion of some kind—I am not sure about that.

This is defendant's Exception No. 17.

25. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony by J. A. Massey, a witness for the plaintiff, over defendant's objection and exception:

12 I think I know what the custom and practice was when supplies were needed by engineers on their engines.

Q. What was it?

A. The man in the store room furnished the supplies upon requisition. The requisition was brought to him, and it had either to be signed by the Master Mechanic, General Foreman, or the Foreman.

This is defendant's Exception No. 18.

26. For that the Supreme Court of North Carolina erred in its construction and application of Sections 1, 3 and 4 of the Federal Employer's Liability Act, and in holding that the trial court did not commit error in overruling defendant's motion for judgment of nonsuit at the conclusion of plaintiff's evidence.

This is defendant's Exception No. 19.

27. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over

defendant's objection and exception, the following question asked defendant's witness, Powhatan Matthews:

Q. How would that have been supplied if there was no guard glass in stock?

This is defendant's Exception No. 20.

28. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, Powhatan Matthews:

What could have been done?

This is defendant's Exception No. 21.

29. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, Powhatan Matthews:

Q. Are the water gauge and water cocks part of the engine that should be inspected by the engineer?

13 This is defendant's Exception No. 22.

30. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, Powhatan Matthews:

Q. Did you ever tell Mr. Horton to run his engine like she was and you would send to Portsmouth and get a guard glass for the Buckner gauge.

A. I don't remember telling him that.

Q. Would you not know whether you told him that or not?

This is defendant's Exception No. 23.

31. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, D. K. Wright:

Q. Did you ever operate an engine that had no gauge glass on it?

This is defendant's Exception No. 24.

32. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, D. K. Wright:

Q. If anything should happen to the gauge glass, what is the duty of the engineer?

This is defendant's Exception No. 25.

33. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, W. S. Burrus:

Q. If an engineer is employed or discharged by the Seaboard, what officer has control of it?

This is defendant's Exception No. 26.

34. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, W. S. Burrus:

Q. Would the notice of the dismissal of an engineer come through your office?

This is defendant's Exception No. 27.

35. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, W. S. Burrus:

Q. Had Mr. Horton's employment as an engineer ceased?

This is defendant's Exception No. 28.

36. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, W. S. Burrus:

Q. When did you request Mr. Horton to return his pass and other property of the Seaboard Air Line Railway, if you did?

By the Court: You want to show a certain date?

By Mr. Allen The defendant proposed to prove by this witness that he did not take up the plaintiff's annual pass, issued to him as an engineer, and the other property belonging to the railroad company, until after suit was brought by the plaintiff against the Seaboard Air Line Railway.

This is defendant's Exception No. 29.

37. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding, over defendant's objection and exception, the following question asked defendant's witness, W. S. Burrus:

Q. When an engineer ceased to be connected with the Seaboard Air Line Railway, is he required to turn over his pass and other property of the railroad to the railroad?

15 This is defendant's Exception No. 30.

38. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff's witness, Dr. A. W. Goodwin:

Q. If the jury should find from the evidence that Mr. Horton has only 20-70 sight in one eye and normal in the other, would he in your opinion be suitable for a railroad engineer's duties?

By the Court: In the first place, the question is whether — has any opinion. Have you an opinion satisfactory to yourself about it?

A. Well, I would think in a deformity in the eye—I would imagine that was a deformity more than a disease, that is simply an opinion—I would think in a deformity in the eye would (any deformity) unfit him for the engineer's service and in testing I did not find any. I would not like to express an opinion, but from a general medical standpoint, I am not an eye specialist, I would think he was unfit.

This is defendant's Exception No. 31.

39. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. I understand from you whatever Mr. Benton or Mr. Burrus or Mr. Hopkins or Mr. Matthews testified to differently from your recollection is not true?

This is defendant's Exception No. 32.

40. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. You say that what Mr. Hopkins said contrary to what
16 you said is not true?

This is defendant's Exception No. 33.

41. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in excluding the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Didn't I understand you to say what Mr. Hopkins said was not true?

By the Court: I do not think that is the way to examine a witness. I think you may direct his attention to any particular thing and ask if that happened.

This is defendant's Exception No. 34.

42. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing upon motion of the defendant, to strike out the following evidence of plaintiff's witness, Ernest Horton, overruled defendant's objection and exception:

Q. What would be the proper thing to do, or would it be the proper thing in the event there was no guard glass on the water gauge to shut off the water glass and run the engine with the gauge cocks?

A. I ran an engine over there for four years and I never shut the glass off.

This is defendant's Exception No. 35.

43. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in overruling defendant's motion for judgment of nonsuit at the conclusion of all the evidence.

This is defendant's Exception No. 26.

44. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Act of Congress, known as the Federal Employers' Liability Act, and in holding that the trial court did not commit error in refusing, over
17 defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

1. The Court charges you that if you believe the evidence, the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue, No.

This is defendant's Exception No. 37.

45. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of said act of Congress in holding that the trial court did not commit error in refusing, over

defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

2. The Court charges you that if you believe the evidence, the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue, Yes.

This is defendant's Exception No. 38.

46. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

3. If you do not answer the second issue, Yes, then the Court charges you that if you believe the evidence, the plaintiff by his own negligence contributed to his injury, and you will answer the third issue, Yes.

This is defendant's Exception No. 39.

47. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

5. The Court instructs you that upon all the evidence in this case the absence of the guard glass and the risk incident to the use of the water gauge in that condition were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, and if plaintiff reported the absence of the guard glass to defendant's foreman and the foreman gave him a promise to repair, a reasonable time for the performance of such promise had expired, and plaintiff assumed the risk of injury and you will answer the second issue, Yes.

This is defendant's Exception 40.

48. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

6. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, the danger was so imminent that no ordinarily prudent man, under the circumstances would have relied upon such promise, and plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

This is defendant's Exception No. 41.

49. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

7. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, there is no evi-

dence that he was induced by such promise to continue to use the engine with the water gauge in a defective condition, and you will answer the second issue, Yes.

This is defendant's Exception No. 42.

50. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

8. The Court instructs you that the absence of the guard glass and the risk incident thereto were so obvious that an ordinarily prudent person would have observed and appreciated them, and you will answer the second issue, Yes, unless plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair.

This is defendant's Exception No. 43.

51. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

9. If you find that the plaintiff reported the absence of the guard glass and was given a promise of repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the Court instructs you to answer the second issue as to assumption of risk, Yes.

This is defendant's Exception No. 44.

52. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in modifying, over defendant's objection and exception, defendant's request for instruction No. 11, by adding at the end thereof, "That is, relying on that promise, he continued to use the engine," as follows:

11. If you find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass without

guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue, Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the

absence of the guard glass and was given a promise of repair, and that he was induced by such promise to continue in the employment.

The Court modified the instruction by adding at the end thereof: "That is, relying on that promise, he continued to use the engine."

This is defendant's Exception No. 45.

53. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

13. If you answer the first issue Yes, then the Court charges you that under the Federal Employers' Liability Act, if you find that the

plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's roundhouse foreman that the guard glass was gone and was given a promise of repair, the time reasonably required for the performance had expired at the time of the explosion of the water glass and you will answer the second issue, Yes.

This is defendant's Exception No. 46.

54. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

18. If you answer the first issue Yes, and if you find by the greater weight of the evidence that the plaintiff appreciated the danger incident to the use of the water glass without the guard glass and that he could have shut off the glass, and operated his engine with safety by using the gauge cocks on his engine and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

This is defendant's Exception No. 47.

55. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

20. The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the greater weight of the evidence, you will answer the first issue, No.

This is defendant's Exception No. 48.

56. For that the Supreme Court of North Carolina erred in its construction and application of said Act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

21. If you find from the evidence that the engine could have been operated in safety by cutting off the water glass and using the gauge cocks, and that the plaintiff continued to use the water glass when he knew there was no guard glass on it and that it was dangerous to use the water glass in that condition, you will answer the first issue, No.

This is defendant's Exception No. 49.

57. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

22. If you find from the evidence that the plaintiff could have performed his duties in operating the engine by using the gauge

cocks for the purpose of telling how much water was in the boiler, and he continued to use the water glass without the guard glass, you will answer the first issue, No.

This is defendant's Exception No. 50.

58. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

They, as I understand the decision, and as I charge you the decision is, hold it is not the duty of the railroad company, not an absolute duty that the railroad company owes to a servant to furnish an absolutely safe place, or absolutely safe and secure tools and appliances and equipment with which to do his work, but that the rule is that the railroad company shall exercise ordinary care and prudence to the end that—I want to use the exact language—to the end that the tools and the appliances of the work may be safe for the workmen. The Supreme Court of the United States says that the common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman.

It is the duty of the employer to exercise due care in respect to providing a safe place of work, and suitable and safe appliances for the work.

This is defendant's Exception No. 51.

59. For that the Supreme Court of North Carolina erred
23 in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

Negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what a reasonable and prudent man under the existing circumstances would not have done. That is negligence.

This is defendant's Exception No. 52.

60. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the *exertion* of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequence would likely be produced thereby.

This is defendant's Exception No. 53.

61. For that the Supreme Court of North Carolina erred in hold-

ing that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

The law is, that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not anticipate the particular injury that did happen. Consequences which flow in unbroken sequence, without an intervening cause from the original negligent act are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular result which did follow.

This is defendant's Exception No. 54.

62. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and second that it did actually produce it.

This is defendant's Exception No. 55.

63. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

If you find from the evidence that the guard glass was in its proper place on the engine when the plaintiff started on his run on the morning of July 27, 1910, and that the defendant had no knowledge of the absence of such a glass, and it was the plaintiff's duty to make a note of the absence of the glass in writing on his work report, and he failed to do so, and you further find that the defendant's failure to have knowledge of the absence of the guard glass was due solely to the plaintiff's failure to make the report in writing of the absence of the guard glass, the Court instructs you that there has been no negligence on the part of the defendant, and you will answer the first issue, No.

This is defendant's Exception No. 56.

64. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.

This is defendant's Exception No. 57.

65. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

Contributory negligence arises when the plaintiff as well as defendant has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury.

This is defendant's Exception No. 58.

66. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The Supreme Court in passing upon this particular case says, that it is the law so far as this case is concerned:

The distinction between contributory negligence and assumption of risk is simple. Contributory negligence involves the notion of some fault or breach of duty on the part of some employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as failure to use such care for his safety as an ordinarily prudent employee under similar circumstances would use.

On the other hand, assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present notwithstanding the exercise of all reasonable care on the part of the employee.

This is defendant's Exception No. 59.

67. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not.

This is defendant's Exception No. 60.

68. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

But risks of another sort not naturally incident to the occupation, may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work.

These risks, the latter risks, the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

This is defendant's Exception No. 61.

69. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

When an employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty.

This is defendant's Exception No. 62.

27 70. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.

This is defendant's Exception No. 63.

71. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defendant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk.

This is defendant's Exception No. 64.

72. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in modifying, over defendant's objection and exception, the following request of defendant for special instruction, by adding at the end thereof, the following words, "that is, relying on that promise he continued to use that engine."

If you find by a preponderance of the evidence that the plaintiff appreciated the risk incident to the use of the gauge glass without the guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair and that he was induced by such promise to continue in the employment.

28 That is, relying on that promise he continued to use that engine.

This is defendant's Exception No. 65.

72½. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

"If you answer the first issue 'Yes,' then the Court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's round house foreman that the guard glass was gone and was given a promise of repair, yet, you should find that the time reasonably required for the performance of this promise had expired at the time of the explosion of the water glass, you will answer the second issue 'Yes.'"

This is defendant's Exception No. 65½.

73. For that the Supreme Court of North Carolina erred in hold-

ing that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

If you answer the second issue Yes, that he assumed the risk incident to his injury, the burden being upon the defendant to satisfy you of that by the greater weight of the evidence, you need not answer the third and fourth issues.

This is defendant's Exception No. 66.

74. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury.

This is defendant's Exception No. 67.

75. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

29 The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the preponderance of the evidence, you will answer the issue Yes, and unless they have so satisfied you, you will answer it No.

This is defendant's Exception No. 68.

76. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's negligent act, and this may embrace indemnity for actual expense incurred, in nursing, medical attention, loss of time, loss of ability to perform mental or physical labor, or capacity to earn money, and actual suffering of body or mind which are the immediate and necessary consequences of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. That is the rule.

This is defendant's Exception No. 69.

77. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion for judgment non obstante veredicto.

This is defendant's Exception No. 70.

78. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion to set the verdict aside because the amount awarded is excessive.

This is defendant's Exception No. 71.

30 79. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion to set the verdict aside as against the weight of the evidence.

This is defendant's Exception No. 72.

80. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, in overruling defendant's motion for nonsuit and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction.

This is defendant's Exception No. 73.

81. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in signing judgment in this case as appears in the record.

This is defendant's Exception No. 74.

82. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in denying the defendant's motion for a new trial for the newly discovered evidence of C. E. Barrow, who would testify that he, the said Barrow, married the sister of James T. Horton's mother, and lived within about three miles of the Horton's home, near Youngsville, N. C., twenty-five or thirty years ago; that he remembers distinctly that the said Horton's eye was injured when he was a boy; that the said eye has been injured ever since the said time; that he saw the injured eye at the time and it is the same eye he now claims to have been injured by the railroad; that he was told by Horton at the time that his eye was hurt by a knife striking it; that the knife was in the hands of one of his brothers and struck him in the eye while they were tusseling.

This is defendant's Exception No. 75.

83. For that the Supreme Court of North Carolina erred in holding that:

31 "There was evidence from which the jury could find that while the absence of the guard glass was a defect causing the injury to plaintiff, and which amount- of negligence on the part of defendant, yet it was not such an imminent danger which would justify excusing the plaintiff, if the plaintiff remained on service after reporting the defect and receiving assurance that it would be repaired.

84. For that the Supreme Court of North Carolina committed error in confirming the judgment rendered in this action, because the said judgment denied to the plaintiff in error, Seaboard Air Line Railway, a construction of the Federal Employers' Liability Act, to which it was entitled and which, if granted would have defeated the right of defendant in error to recover in this action.

85. The Supreme Court of North Carolina for the various reasons set forth, committed error in rendering the final judgment that it did render against the plaintiff in error in this action.

Wherefore, for these and other manifest errors appearing in the record, the Seaboard Air Line Railway prays that the said judgment

of the Supreme Court of North Carolina, dated the 12th of May, 1915, be reversed and the judgment rendered in favor of plaintiff in error, and for costs.

June 23rd, 1915.

MURRAY ALLEN,

Attorney for Seaboard Air Line Railway.

32 [Endorsed:] Seaboard Air Line Railway, Plaintiff in Error, vs. James T. Horton, Defendant in Error. Petition for Writ of Error, Assignment of Errors and Prayer for Reversal. Filed and copies lodged for defendant in error this June 24, 1915. J. L. Seawell, Clerk Supreme Court of North Carolina.

33 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James T. Horton, plaintiff, and Seaboard Air Line Railway, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised, under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according

34 to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of

the United States, the 23 day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern District of N. C.
at Raleigh.]

ALEX. L. BLOW,
*Clerk District Court, United States,
Eastern District of North Carolina.*

Allowed by
WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

This 23 day of June, 1915.

35 [Endorsed:] Seaboard Air Line Railway, Plaintiff in
Error, vs. James T. Horton, Defendant in Error. Writ of
Error. Filed and copy lodged for defendant in error this 24 day
of June, 1915. J. L. Seawell, Clerk Supreme Court of North
Carolina.

36 UNITED STATES OF AMERICA, ss:

To James T. Horton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the Office of the Clerk of the Supreme Court of North Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 23 day of June, in the year of our Lord one thousand nine hundred and fifteen.

WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

I, William C. Douglass, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and acknowledge receipt of a true copy of same, together with copy of petition for writ of error, assignment of errors, prayer for reversal, bond and writ of error. This 26 day of June, 1915, at Raleigh, N. C.

WILLIAM C. DOUGLASS,
*Attorney for James T. Horton,
Defendant in Error.*

37 [Endorsed:] Seaboard Air Line Railway, Plaintiff in Error, vs. James T. Horton, Defendant in Error. Citation. Filed and copy lodged for defendant in error this 24 day of June, 1915. J. L. Seawell, Clerk Supreme Court of North Carolina.

38 The Supreme Court of North Carolina, Spring Term, 1915.
No. 255.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.

JAMES T. HORTON, Defendant in Error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a corporation of the State of Virginia and other States, the principal office of which is in the City of Portsmouth, State of Virginia, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto James T. Horton in the full and just sum of Seven Thousand Dollars (\$7,000.) to be paid to the said James T. Horton, his certain attorney, executors, administrators, or assigns; for the payment of which sum, well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 23 day of June, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a hearing had before the Supreme Court of North Carolina in a suit depending in said Court, between the said James T. Horton, as plaintiff, and Seaboard Air Line Railway, as defendant, a final judgment was rendered against the said Seaboard Air Line Railway and the said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the said final judgment in the aforesaid suit, and a citation having been directed to the said James T. Horton citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, therefore, the condition of this obligation is such, that if the said Seaboard Air Line Railway shall prosecute its said writ of error to effect, and answer all damages and costs which may be adjudged against it, if it fail to make its plea good, then this
39 obligation is to be void; else to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]

(S.) By MURRAY ALLEN, *Attorney.*

FIDELITY & DEPOSIT COMPANY

OF MARYLAND,

[SEAL.]

(S.) By JOSEPH B. CHESHIRE, *Attorney in Fact.*

(S.) RALEIGH INSURANCE AND REALTY

CO., *Agents,*

By JAS. McKIMMON, *Agent.*

Bond approved and to act as supersedeas, this 23 day of June, 1915.

(S.) WALTER CLARK,
Chief Justice, Supreme Court of North Carolina.

40

Seventh District.

No. —.

JAMES T. HORTON
against
SEABOARD AIR LINE RAILWAY.

(From Wake.)

Before H. W. Whedbee, J.

Defendant appealed.

Caption.

Be it remembered, that at a Superior Court begun, continued and held in and for the County of Wake, State of North Carolina, at the court house in the city of Raleigh, on the first Monday after the first Monday of September, 1914, it being the 14th day of September, 1914, before Honorable H. W. Whedbee, Judge presiding, the following proceedings were had, to-wit:

Summons for Relief.

WAKE COUNTY:

In the Superior Court.

JAMES T. HORTON
against
SEABOARD AIR LINE RAILWAY.

The State of North Carolina to the Sheriff of Wake County, Greeting:

You are hereby commanded to summon Seaboard Air Line Railway, the defendant above-named, if it be found within your county, to be and appear before the Judge of our Superior Court at a court to be held for the County of Wake, at the court house in Raleigh, N. C., on the seventh Monday after the first Monday of September, it being the 24th day of October, 1910, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer the complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.
Given under my hand and seal of said court, this 5th day of
October, 1910.

W. M. RUSS,
Clerk Superior Court.

Prosecution Bond.

We acknowledge ourselves bound unto the defendant in this
action in the sum of \$200; to be void, however, if the plaintiff shall
pay to the defendant all such costs as the defendant may recover
of the plaintiff in this action.

Witness our hands and seals, this 5th day of October, 1910.

J. T. HORTON. [SEAL.]

J. S. HORTON. [SEAL.]

Return on Summons.

Received October 6, 1910; served October 10, 1910, by reading
the within summons and delivering a copy of the same to W. T.
Huntley, agent at Raleigh, N. C., for Seaboard Air Line Railway,
the defendant therein named.

J. H. SEARS,
Sheriff of Wake County,
By H. H. CROCKER, D. S.

And on the 9th day of November, 1910, the plaintiff, James T.
Horton, by his attorneys, Messrs. Douglass, & Lyon and Holding,
Snow & Bunn, comes and complains as follows:

42

Complaint.

NORTH CAROLINA,
Wake County:

Superior Court, January Term, 1910.

(Title of Cause.)

The plaintiff, complaining of the defendant, alleges:

1. That on the 4th day of August, 1910, and some time prior
thereto, and ever since that time, the defendant was and now is
a corporation duly chartered and organized and engaged in the
operation of a line of railway from Hamlet, N. C., to Portsmouth,
Va., via Raleigh, N. C., and other points north and south thereof,
outside of the State of North Carolina.

2. That on the said 4th day of August, 1910, the plaintiff, who
was then and now is a resident of the County of Wake, State of North

Carolina, was a young man thirty-one years of age, with perfect eyes and eyesight and otherwise physically and mentally sound, was in the employ of the defendant as a locomotive engineer, and on said day and date was engaged in running and operating a locomotive engine of defendant, and in the discharge of his duties as locomotive engineer aforesaid, drawing a train of loaded freight cars, a part of which said cars were loaded with goods, wares and merchandise which the defendant had received for transportation and was transporting from points inside the State of North Carolina, to Portsmouth, Va., and other points outside of North Carolina, over its said line of railroad.

3. That it was the duty of the defendant to furnish to the plaintiff a locomotive engine for the use of the plaintiff in the discharge of his duties as locomotive engineer aforesaid that was properly equipped with modern safety appliances that were in general use, especially with a modern and safe water glass, such as was at that time in general use upon railroad steam locomotives, for the purpose

43 of gauging the water in the steam boiler of the said locomotive, and such as would protect the plaintiff from injury to his person while in the discharge of his duties as locomotive engineer aforesaid, and that would afford him a safe place where he might discharge his said duties.

4. That in disregard of its aforesaid duty to the plaintiff on the day and date aforesaid, the defendant negligently furnished to the plaintiff a locomotive engine with which to draw the aforesaid cars loaded with goods, wares and merchandise as aforesaid, negligently and carelessly equipped with a water glass that was not modern in its make and that was unsafe for use, and that was of an inferior grade and quality, and which water glass was known to the defendant to be not modern in its make and unsafe for use and of an inferior grade and quality and liable to burst and seriously and permanently injure the plaintiff while in the discharge of his duty as locomotive engineer aforesaid.

5. That while in the discharge of his duty as locomotive engineer as aforesaid, and while running and operating the locomotive engine which the defendant negligently furnished as aforesaid to the plaintiff on the day and date aforesaid, negligently and carelessly equipped with said defective glass not modern in its make and unsafe for use as aforesaid and which was of an inferior grade and quality as aforesaid, at a point on the line of the defendant's said railroad in the county of Wake, State of North Carolina, known as the town of Apex, the plaintiff, as it was his duty frequently to do, looked at the aforesaid water glass with which said engine was equipped as aforesaid, for the purpose of ascertaining the amount of water that was in the boiler of said locomotive, and while he was so looking, said water glass, on account of its being defective as aforesaid, and of inferior grade and quality as aforesaid, and not modern in its make as aforesaid, was exploded and burst by the steam pressure from said boiler, and pieces of flying glass therefrom were violently thrown thereby into the face and right eye of the

44 plaintiff, seriously, painfully and permanently wounding, cutting and bruising his face and eyeball of the plaintiff's right eye and almost totally destroying the vision of the plaintiff's right eye, so that his trade, business and calling as a locomotive engineer has been destroyed by reason of said injuries and so that the plaintiff has been rendered totally unfit and unable to perform the duties of his said trade, business and calling, and has lost his employment with the defendant on account thereof, and is unable to obtain employment as a locomotive engineer with the defendant or any one else.

6. That on account of the aforesaid negligence of the defendant as hereinbefore set out, the plaintiff has been seriously, permanently and painfully injured and rendered totally and permanently unfit to perform the duties of his trade, business and calling, has suffered great physical pain and mental anguish; has lost much time from his business; has been sorely inconvenienced; has spent large sums of money for medical attention and medicines, and has been injured and damaged in the sum of fifty thousand dollars.

7. That at the time that plaintiff was injured as alleged in this complaint, the defendant was engaged in interstate commerce, and the plaintiff was employed and engaged in interstate commerce, and brings this action under the Federal Employers' Liability Act passed by the United States Congress and approved on the 22nd day of April, 1908, and the amendments thereto.

Wherefore, the plaintiff prays judgment that he recover of the defendant fifty thousand dollars damages, together with the costs of this action, and for such other and further relief as he may be entitled to in the premises.

DOUGLASS & LYON,
HOLDING, SNOW &
BUNN,

Attorneys for Plaintiff.

45

Verification.

NORTH CAROLINA,
Wake County:

James T. Horton, the plaintiff above-named, being duly sworn, deposes and says that the foregoing complaint is true to his own knowledge, except as to matters stated on information and belief, and that as to those matters he believes it to be true.

JAMES T. HORTON.

Sworn to and subscribed before me, this the 9th day of November, 1910.

W. M. RUSS,
Clerk Superior Court.

And thereafter, to-wit, on the 6th day of December, 1910, the defendant, by its attorney, Murray Allen, Esq., comes and answers as follows, to-wit:

Answer.

NORTH CAROLINA,
Wake County:

Superior Court, October Term, 1910.

(Title of Cause.)

The defendant, answering the complaint herein, says:

1. That the allegations of section 1 are admitted.
2. The defendant denies, upon information and belief, that on August 4, 1910, the plaintiff was a young man with perfect eyes and eyesight and otherwise physically and mentally strong, as alleged in section 2 of the complaint.
3. The defendant is informed, advised and believes, that the allegations of section 3 of the complaint state matter of law, and the defendant is not called upon to make answer thereto; but the defendant says, in regard to the matters set forth in said
46 section, that it has performed its duty to plaintiff in every respect as required by law.
4. The allegations of section 4 are not true, and are denied.
5. The allegations of section 5 are not true, and are denied.
6. The allegations of sections 6 are not true, and are denied.

And for further defense, the defendant says:

1. That if the plaintiff was injured as alleged in the complaint, which the defendant expressly denies, the said injury was caused by the negligence of the plaintiff in the manner in which he used the water glass, which he alleges was in a defective condition, and the manner in which he operated the engine on which he was employed, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.
2. That if the engine on which plaintiff was employed was defective in any respect on August 4, 1910, as alleged in the complaint, which the defendant again denies, such condition was known to the plaintiff, and he carelessly and negligently failed to report said condition to defendant's foreman as it was his duty to do, and his contributory negligence in that respect is pleaded by the defendant in bar of plaintiff's right to recover in this action.
3. That if the defendant was negligent as alleged in the complaint, which is again expressly denied, the plaintiff by his own negligence, contributed to his injury, if any he has sustained, in that, having knowledge of the character and condition of the water glass on the engine upon which he was employed, and knowing the risk incident to its use in that condition, he negligently and carelessly continued to use said water glass, and the defendant pleads plaintiff's contributory negligence in bar of his right to recover in this action.
4. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the water glass on the engine on which he was employed was not modern in its make and was defective in any respect, both of which are de-

47 nied, the character and condition of said water glass were open and obvious and were fully known to the plaintiff and he continued to use said water glass with such knowledge and without objection, and he knew and voluntarily assumed the risk incident thereto, and the defendant pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

Wherefore, the defendant demands judgment that it go without day and recover the costs of this action, to be taxed by the Clerk.

MURRAY ALLEN,
Defendant's Attorney.

Verification.

J. F. Mitchell, being duly sworn, says that he is agent for the defendant company at Raleigh, N. C.; that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

J. F. MITCHELL.

Sworn to and subscribed before me, this 6th day of December, 1910.

[N. P. SEAL.]

CARY K. DURFEY,
Notary Public.

Commission expires September 19, 1912.

And thereafter, to-wit, on the 20th day of April, 1911, the defendant, by its attorneys, Messrs. Armistead Jones & Son, and Murray Allen, comes and files an amended answer, as follows:

48 *Amended Answer.*

NORTH CAROLINA,
Wake County:

Superior Court, October Term, 1910.

The defendant answering the complaint herein, says:

1. That the allegations of section 1 are admitted.
2. The defendant denies, upon information and belief, that on August 4, 1910, the plaintiff was a young man with perfect eyes and eyesight, as alleged in section 2 of the complaint. At the time alleged in the complaint the plaintiff was engaged as engineer in the operation of an engine drawing a train between Aberdeen, N. C., and Raleigh, N. C., and his duties were performed entirely in the State of North Carolina.

3. The defendant is informed, advised, and believes, that the allegations of section 3 of the complaint state matter of law and the defendant is not called upon to make answer thereto; but the defendant says, in regard to the matters set forth in said section, that it

has performed its duty to plaintiff in every respect as required by law.

4. The allegations of section 4 are not true, and are denied.

5. The allegations of section 5 are not true, and are denied.

6. The allegations of section 6 are not true, and are denied.

7. The defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of section 7 of the complaint, and therefore demands strict proof thereof.

And for further defense, defendant says:

1. That if the plaintiff was injured as alleged in the complaint, which the defendant expressly denies, the said injury was caused by the negligence of the plaintiff in the manner in which he used the water glass, which he alleges was in a defective condition, and in the manner in which he operated the engine on which he was employed, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.

49 2. That if the engine on which plaintiff was employed was defective in any respect on August 4, 1910, as alleged in the complaint, which the defendant again denies, such condition was known to the plaintiff, and he carelessly and negligently failed to report said condition to defendant's foreman, as it was his duty to do, and his contributory negligence in that respect is pleaded by the defendant in bar of plaintiff's right to recover in this action.

3. That if plaintiff was injured as alleged in the complaint, which the defendant again expressly denies, the plaintiff by his own negligence contributed to his injury, if any he has sustained, in that, having knowledge of the character and condition of the water glass on the engine upon which he was employed, and knowing the risk incident to its use in that condition, he negligently and carelessly continued to use said water glass, and the defendant pleads plaintiff's contributory negligence in bar of his right to recover in this action.

4. The defendant, again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the plaintiff was injured by the explosion of the water gauge on the engine on which he was employed, which is denied, the said injury was caused by his own negligence in using the said water gauge when he could have operated said engine by using the gauge cocks thereon, and his contributory negligence is pleaded by the defendant in bar of plaintiff's right to recover in this action.

5. The defendant again denying that the plaintiff sustained the injuries as alleged in the complaint, says that if the water glass on the engine on which he was employed was not modern in its make and was defective in any respect (both of which are denied), the character and condition of the said water glass were open and obvious and were fully known to the plaintiff, and he continued to use said water glass with such knowledge and without objection, and he knew and voluntarily assumed the risk incident thereto, and the defendant pleads such voluntary assumption of risk

50 in bar of plaintiff's right to recover in this action.

6. The defendant, again denying that the plaintiff sustained

the injuries as alleged in the complaint, says that if the water glass on the engine on which plaintiff was employed was not modern in its make and was defective in any respect (both of which are denied), it was the plaintiff's duty, and he had every opportunity, to know the condition thereof, and the risk incident thereto, if any, was assumed by the plaintiff, and his said assumption of risk is pleaded by the defendant in bar of the plaintiff's right to recover in this action.

7. That if the plaintiff was injured as alleged in the complaint, which is denied, there was open to him two ways of operating the engine on which he was employed: by using the water glass and by using the gauge cocks, which was a safe way to operate said engine; and in voluntarily operating the said engine with the water glass as alleged in the complaint, the plaintiff assumed the risk of injury therefrom, and his assumption of risk is pleaded by the defendant in bar of plaintiff's right to recover in this action.

Wherefore, the defendant demands judgment that it go without day, and recover the costs of this action, to be taxed by the Clerk.

ARMISTEAD JONES & SON,
MURRAY ALLEN,

Defendant's Attorneys.

Verification.

J. F. Mitchell, being duly sworn, says that he is agent for the defendant company at Raleigh, N. C.; that the foregoing answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

J. F. MITCHELL.

51 Sworn to and subscribed before me, this 15th day of April, 1911.

C. T. McDONALD,
Notary Public.

My commission expires 1st day of February, 1912.

This cause came on for trial at April Term, 1911, of the Superior Court of Wake County, and at the conclusion of the plaintiff's evidence, his Honor, Judge H. W. Whedbee sustained defendant's motion for judgment of nonsuit and dismissed the action. Plaintiff appealed to Supreme Court, and at Fall Term, 1911, of the Supreme Court of North Carolina the judgment of the Superior Court was reversed, and a new trial ordered.

This cause being called for trial at October Term, 1912, of Wake County Superior Court, plaintiff moved to amend his complaint as follows, which motion was allowed and the complaint so amended:

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

Superior Court, October Term, 1912.

(Title of Cause.)

The plaintiff amends his complaint filed herein, as follows, by inserting in paragraph four thereof, the following:

That the said water glass was imperfect, defective, dangerous and unsafe in the following particulars, which were also known to the defendant, and by it negligently allowed to continue and exist, to-wit: in that the same had no guard glass or shield in front thereof and in connection therewith.

DOUGLASS, LYON & DOUGLASS,
W. B. SNOW,
J. W. BUNN,
R. N. SIMMS,

Plaintiff's Attorneys.

52

Verification.

NORTH CAROLINA,
Wake County:

James T. Horton, the plaintiff, being duly sworn, deposes and says that he has read the foregoing amendment; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes it to be true.

JAMES T. HORTON.

Sworn to and subscribed before me, this 21st day of October, 1912.

VITRUVIUS ROYSTER,
Deputy Clerk.

Answer to Amendment to Complaint.

The defendant filed the following answer to the amendment to plaintiff's complaint:

"Answering said amendment to the complaint, defendant says: 'The allegations of said amendment are not true, and are denied.'"
Verification of this answer is waived by plaintiff.

Trial, Jury, etc.

Therefore let a jury come by whom, etc.
And thereupon, after the introduction of evidence on behalf of

the plaintiff and defendant, and after the charge of the Court, said jurors heretofore empaneled in this case, for their verdict found the issues submitted to them as follows:

Issues, Verdict.

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. "Yes."

53 2. If so, did the plaintiff assume the risk of injury?

Answer. "No."

3. Did plaintiff, by his own negligence, contribute to his injury?

Answer. "No."

4. What damages, if any, is the plaintiff entitled to recover?

Answer. "\$4,500."

Motion to Set Verdict Aside, etc.

Upon the coming in of the verdict, defendant moved for judgment non obstante veredicto. Motion overruled. Defendant excepts.

Defendant moves to set the verdict aside, because the amount of damages awarded is excessive. Motion overruled. Defendant excepts.

Defendant moves to set the verdict aside as against the weight of evidence. Motion overruled. Defendant excepts.

Defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, in overruling defendant's motion for judgment of nonsuit, and in the Court's charge to the jury, and in the Court's refusal to give defendant's requests for instruction. Motion overruled. Defendant excepts.

And thereupon judgment is rendered and filed, as follows:

Judgment.

NORTH CAROLINA,
Wake County:

Superior Court, September Term, 1914.

(Title of Cause.)

This cause coming on to be tried before his Honor, H. W. Whedbee, Judge, and a jury, and being tried, the following issues were submitted to the jury:

54 1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

4. What damages, if any, is the plaintiff entitled to recover?

And the jury having answered the first issue "Yes"; the second issue "No"; the third issue "No", and the fourth issue "Four thousand, five hundred dollars"; it is—

Ordered, adjudged and decreed that the plaintiff, James T. Horton, recover of the defendant, Seaboard Air Line Railway, the sum of four thousand, five hundred (\$4,500) dollars and the costs of this action, to be taxed by the Clerk.

H. W. WHEDBEE,
Judge Presiding.

To the judgment signed by the Court defendant excepts, and in open court appeals to the Supreme Court. Notice of appeal given in open court, and further notice waived. Undertaking on appeal fixed in the sum of \$50.00.

By consent, defendant is allowed 60 days to file and serve statement of case on appeal, and the plaintiff is allowed 60 days thereafter to serve counter statement or exceptions.

Defendant thereupon filed the following appeal bond and bond to stay execution:

Appeal Bond.

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1914.

(Title of Cause.)

Whereas at September Term, 1914, of the Superior Court of Wake County judgment was rendered against defendant in the above-entitled action in the sum of \$4,500 and costs; and, whereas, the defendant intends to appeal to the Supreme Court:

Now, therefore we, Seaboard Air Line Railway and Fidelity — Deposit Company, of Maryland, undertake pursuant to the statute, that the defendant shall pay all costs which may be awarded against defendant on such appeal bond, and not exceeding, however, the sum of \$50.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, [SEAL.]
By JOSEPH B. CHESHIRE, Jr., *Attorney in Fact,*
By J. L. SKINNER, *Agent.*

Bond to Stay Execution.

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1914.

(Title of Cause.)

Know all men by these presents that the Seaboard Air Line Railway, as principal, and the Fidelity and Deposit Company, of Maryland, as surety, are held and firmly bound unto James T. Horton in the just and full sum of \$6,000, the payment whereof, well and truly to be made, we bind ourselves and our successors and assigns jointly and severally, firmly by these presents.

Sealed *by* our seals, and dated this 7th day of October, 1914.

The condition of the above obligation is such that whereas in a certain action pending in the Superior Court of Wake County, North Carolina, between James T. Horton and the Seaboard Air Line Railway, on the 26th day of September, 1914, the said James T.

Horton recovered judgment against the said Seaboard Air Line Railway in the sum of \$4,500; and, whereas, the said

Court did make an order suspending execution upon the defendant's giving bond in the sum of \$6,000, with condition according to law; and, whereas, it is the intention of the Seaboard Air Line Railway to appeal the judgment aforesaid:

Now, therefore, if the said judgment appealed from or in any part thereof be affirmed, or the appeal dismissed, and if the Seaboard Air Line Railway will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages that shall be awarded against the said Seaboard Air Line Railway upon said appeal, then the above obligation is to be void, otherwise to remain in full force and virtue.

SEABOARD AIR LINE RAILWAY, [SEAL.]

By MURRAY ALLEN, *Attorney.*

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]

By JOSEPH B. CHESHIRE, Jr., *Attorney in Fact,*
By J. L. SKINNER, *Agent.*

Thereafter, and before the expiration of the term of court at which said suit was tried and judgment rendered, defendant filed the following motion for a new trial for newly-discovered evidence:

Motion for New Trial for Newly-Discovered Evidence.

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1914.

(Title of Cause.)

To the Honorable H. W. Whedbee, Judge Superior Court:

The petition and motion of the defendant in the above entitled cause respectfully shows:

57 1. That the plaintiff in this action brought suit for the recovery of damages for injury to his right eye, alleged to have been caused by the explosion of water glass, while employed on defendant's railroad as engineer.

2. That defendant denied that the injury complained of was due to the explosion of said water glass, and set up as a defense that plaintiff's eye was injured prior to the time alleged in the complaint, and that the defective vision of plaintiff is due to the scar left there by an old injury.

3. That defendant offered evidence of Dr. Battle, who testified that he examined plaintiff's eyes in 1905, nearly five years before the alleged injury, and found the vision in plaintiff's right eye, which he alleges was injured, to be 20/70, which is the condition of vision in said eye found to exist by Dr. Horton, who examined plaintiff's eyes in 1912, after the date of the alleged injury.

4. That the plaintiff testified and offered evidence of Dr. Goodwin to prove that his eye-sight in his right eye was normal prior to date of the alleged injury, and that he had never received an injury to the said eye prior to that time, and the plaintiff vigorously denied that the said eye had ever been injured, except at the time alleged.

5. That the jury found the issues in favor of plaintiff, and awarded him \$4,500.

6. That the defendant had no evidence that the plaintiff's eye had been injured by being struck with a knife in the hands of one of his brothers when he was a boy, and had been unable after having exercised due diligence to secure such evidence.

7. That after the trial of the action, and during this term of Court, the defendant was apprised for the first time of the fact that the plaintiff's eye had been injured when he was a boy by a knife striking him in the eye, and the defendant received information through its counsel that C. E. Barrow had stated that he remembered the time the plaintiff received the said injury to his eye; that he knew the said eye had been in a damaged condition
58 since that time, and that the said injury was due to plaintiff's eye being struck by a knife in the hands of one of his brothers.

8. That thereupon one of defendant's counsel consulted said C. E. Barrow about the matter, and he stated to defendant's counsel

the facts in this connection, which appear in an affidavit attached hereto.

9. That the said C. E. Barrow, if sworn to testify in this case, as he will be subpoenaed to do so, he will testify to the facts as set forth in said affidavit of defendant's counsel, Murray Allen.

10. That the said evidence is probably true.

11. That the said evidence is competent, material and relevant.

12. That the defendant had no knowledge of the existence of this testimony prior to the trial or during the trial of this action, and did not secure such information until after judgment had been rendered.

13. That the said evidence is not merely cumulative.

14. That the said evidence does not tend only to contradict a former witness or to impeach or discredit him.

15. That it is of such a nature as to show that on another trial a different result will probably be reached, and that the right will probably prevail.

16. That after making the statements as set forth in the affidavit of Murray Allen, the said C. E. Barrow stated that the facts were true, and that he would make an affidavit setting forth said facts, although he would not like to do so on account of his relations with James T. Horton, but subsequently and on the same day the said C. E. Barrow said he would not make an affidavit, but he did not deny the truth of the statement.

Wherefore, your petitioner prays that the verdict and judgment in this case be set aside and a new trial awarded in order that the defendant may have an opportunity to present the said newly-discovered evidence to the jury, and the defendant prays
59 that the Court may have the said C. E. Barrow brought before the Court and examined upon oath as to the facts set forth in the affidavit of Murray Allen.

WINSTON & BIGGS,
MURRAY ALLEN,
Attorneys for S. A. L. Railway.

L. M. Calvert, being duly sworn, says that he is agent for the defendant Seaboard Air Line Railway at Raleigh, N. C.; that he has read the foregoing petition, and that the facts set forth in said petition are true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

L. M. CALVERT.

Subscribed and sworn to before me this 8th day of October, 1914.

C. A. GOSNEY,
Notary Public.

My commission expires 29th day of January, 1916.

Affidavit.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

Murray Allen, being duly sworn, says that he is attorney for the defendant Seaboard Air Line Railway in above action, which was tried at September Term, 1914, of Wake Superior Court; that after judgment was rendered against the defendant in said action, affiant was informed that C. E. Barrow had stated that he remembered that James T. Horton received an injury to his eye when he was a boy, and that the said injury was caused by a knife in the hands

of one of his brothers, striking the said Horton in the eye while they were playing; that this was the first information

that had reached affiant as to the existence of this witness or as to the facts which he had stated, and affiant had never received information that the said Horton had received an injury to his eye in the manner stated; that affiant talked with said C. E. Barrow, after receiving this information, and that the said Barrow made a statement to affiant as follows:

That he, the said Barrow, married the sister of James T. Horton's mother, and lived within about three miles of the Horton's home, near Youngsville, N. C., 25 or 30 years ago; that he remembers distinctly that the said Horton's eye was injured when he was a boy; that the said eye has been injured ever since said time; that he saw his injured eye at the time and that it is the same eye he now claims to have been injured by the railroad; that he was told by Horton at the time, that his eye was hurt by a knife striking it; that the knife was in the hands of one of his brothers, and struck him in the eye while they were tusseling; that he would not like to have anything to do with Horton's suit because they did not speak to each other, and because of his connection with the family, but that the statement he had made was true, and he could so testify, if called upon to do so, and that he would make an affidavit to that effect.

That subsequently the said Barrow called affiant on the telephone, and said he would not make the affidavit: that he preferred not to have anything to do with the case. Affiant further says that the said C. E. Barrow will, if subpoenaed as a witness, give the evidence as contained in his statement to affiant; that it is probably true; that it is competent, material and relevant: that there has been no laches, and that the defendant used due diligence to procure this testimony prior to the trial of this action; that the evidence is not merely cumulative; that it does not tend only to contradict a former witness, or to impeach or discredit him; and that this evidence is of such a nature that on another trial a different result will probably be reached, and that the right will prevail.

MURRAY ALLEN.

Sworn to and subscribed before me, this 8th day of October, 1914.

[SEAL.]

C. A. GOSNEY,
Notary Public.

My commission expires 29th day of January, 1916.

Order.

NORTH CAROLINA,
Wake County:

Superior Court, September Term, 1914.

(Title of Cause.)

This cause coming on to be heard at this term, upon motion, supported by affidavit, to set aside the verdict and judgment entered at this term, on the ground of newly discovered evidence, and the same being considered and the Court being of opinion that the proposed newly discovered evidence, if true, is merely cumulative, it is now ordered and adjudged by the Court that said motion be and it is hereby denied.

H. W. WHEDBEE,
Judge Presiding.

To this order defendant excepts.

H. W. WHEDBEE,
Judge Presiding.

Defendant's Statement of Case on Appeal.

NORTH CAROLINA,
Wake County:

Superior Court, September Term, 1914.

(Title of Cause.)

This was a civil action for damages brought by the plaintiff under the Federal Employers' Liability Act, to recover for personal injuries alleged to have been sustained by plaintiff while employed by the defendant. The action was tried at September Term, 1914, of the Superior Court of Wake County, before his Honor, H. W. Whedbee, Judge, and a jury. The pleadings which appear in the record show the contentions of the parties. The issues with the answers made thereto by the jury and the judgment rendered upon the verdict appear in the record.

Plaintiff offered the following evidence:

Plaintiff's Testimony.

NORTH CAROLINA,
Wake County:

Superior Court, September Term, 1914.

(Title of Cause.)

JAMES T. HORTON, the plaintiff in this action, having been duly sworn, testified as follows:

Direct examination.

Examination by Mr. Douglass:

I am the plaintiff in this case, and live in Raleigh. Have lived in Wake County about 20 years, and am now 34, and will be 35 years old my next birthday. My occupation prior to the alleged injury was engineer on the second division of the Seaboard. The second division is between Hamlet and Columbia and Wilmington and Rutherfordton and up to here. Up to August 10, 1910, I had been in the employ of the Seaboard about eight years and a half, five years and a half as engineer, and three years as fireman. Along at the time I was hurt the character of the trains I was running consisted of every train they had, but my regular train was local freight between Raleigh and Aberdeen. I had done extra passenger work. I received wages from \$165 to \$-90 per month, according to how many trips I worked; I mean by that \$165 to \$190 a month. Prior to the time of this injury the condition of my health was good. Condition of my eyes as to sight was good. I will show you what a water glass in a locomotive is. (Witness unwraps a parcel and holds up an article.) That is a water glass, a hollow glass tube, which is fixed in a locomotive engine on the left side of the boiler head, to the left of the engineer, next to the fireman's side. I will explain its office on a locomotive engine; what it is used for. It is connected at the top and bottom with a valve, and you turn your water and steam pressure into this tube, and it enables you to see how much water you are carrying in your boiler at all times; it is the only way you can tell exactly how much water is in your boiler; is to see it in the glass. I will show you what a Buckner water gauge is. (Holds up an article.) This (pointing) is the tube connection, and this (pointing) is the steam connection. Inside of the brass tube is a glass tube like the one I had, and it will—both will—come out. I will explain what a Buckner water glass is. It is a brass tube or gauge, with the water valve at the bottom and steam valve at the top, with this (pointing) thick piece of glass on the top makes the Buckner water glass complete. I will explain how it works. You drop this piece of glass in the tube and it protects anyone from flying glass in case the tube bursts. You can see through the thick glass in through the other and tell how your water stands in your boiler. The piece of thick

glass is to prevent flying glass from hitting you in case this inner tube should burst. The amount of pressure on the inner tube is the same pressure that you carry on your boiler; 200 pounds is about what we carry on standard engines, some 150; the one I had carried 200; all new engines carry 200. I was in the employ of the S. A. L. Ry. on the 4th of August, 1910. On that morning I had engine 752, Richmond engine, 10-wheel engine, and I left Aberdeen on August 4th at 6:35 A. M., on train No. 2, 64 a local freight, and arrived at Apex right around 1.00 o'clock, between 1:00 and 1:30. The conductor told me that he had to go to the house track with three cars, three head cars, and he would leave two of them at the house and come out with the head car, and when he was there doing that work I pulled up to the street crossing at Apex and cut off the three head cars with the engine and went up to the cross-over, and there is a locking plant where we cross the Norfolk Southern, and backed down to the depot with these three cars, and the head brakeman uncoupled my engine, and I went out to the main line, up to the pass track, and went up to get water while they were unloading the cars, and I got the water and backed up, and as I crossed the crossing, it may have been just before I crossed the crossing or as I crossed the crossing, I don't know which; anyway, I told the fireman or he might have suggested, to go to the store and get something to eat, and then I pulled up there. The second brakeman, Willis Crumpler, he was on the back of the tender, and we passed over the interlocking plant, and I backed down to the platform, about ten feet of the cars, and just as I stopped the engine—you see they were unloading on the left hand side, my fireman's side, and my fireman was not on the engine, and I stopped about eight or ten feet from the car, and as I stopped the engine I was sitting in this position (illustrates), facing across: cross-ways the engine, to the fireman's side, looking back, with the reverse lever between my legs, just like this, with my hand on the brake, and the engine stopped and the water glass burst, and some of the flying glass hit me in the face and eyes, and the cab was full of steam and hot water, and I climbed over to the fireman's side and shut off the top and bottom valves as best I could, and went around to the *spicket* on the tender, where you draw water and sloshed water into my eye and wet my handkerchief, and I was about a car length from the depot platform, and went to the platform and called the conductor, and he came and asked what was the trouble, and I told him the glass had burst and hit me in 65 the eye and get me to a doctor, and he told me all right, and said to close the car doors, and we went out to the main line and backed down to the train, and we coupled up to the train, and Fireman Benton came with something to eat, and as soon as we pumped the brakes off we started, and Benton ran the engine to Raleigh, and Conductor Orrell was with us, and about ten minutes after we left there we arrived at Cary, and there was a red board there, and we stopped while the conductor went in to see what orders they had for him, and I went to the drug store to see if I could not get the druggist to put something in my eye. I was suffering every-

thing I could suffer with my eye. I do not know who the druggist was. He was a new man, not a licensed druggist, and he was afraid to tamper with it, and there was no doctor available, and I would have to tough it out until I got to Raleigh, and I went back to the engine, and the conductor, Orrell, had the clearance card, and we left for Raleigh, and I asked them to wire to Raleigh to have a doctor and carriage meet me at Johnson Street. No doctor, but a carriage met me, and I got in the carriage and went to Dr. Lewis' office. I did not find Dr. Lewis there. Dr. Rogers said he was phoning for him, and Dr. Lewis came in about five minutes after I got there. There was 200 pounds pressure in the boiler at the time the glass burst. When Dr. Lewis came I was sitting in the chair holding my head, and he came in and took an eye-dropper and gave me attention, dropped something in my eye and told me to shut it, and then waited about three or four minutes and put some kind of liquid in my eye again, and it kind of eased it. Dr. Lewis treated me 30 to 40 days. The condition of my eye all along from the time Dr. Lewis first treated me, I suffered some, but, of course, the older the wound got the less and less I suffered, but the first three or four nights or the first week I just walked the floor all night; I could not sleep, and kept hot towels on my face. Dr. Lewis told me to keep them on. It was about 60 or 90 days before

66 I opened up my eye to the light; then with respect to my ability to see, I could not see one-third out of that eye as well as I could before I got hit. Before I was hit I could see all right. The condition of failure to see out of that right eye continues now. There is no improvement since I first took off the bandage. I have recently been examined by an oculist, on last Tuesday by Dr. M. C. Horton, who is no relation of mine. He lives in Raleigh, and has examined me before that time, May, 1912, the best I remember. The engine I was operating the day I was injured was equipped with a Buckner water gauge. It had this (points) on there, the frame and the gauge, but this guard glass was gone. The guard glass is made of glass about $\frac{1}{2}$ inch thick, about $1\frac{1}{2}$ or $\frac{3}{4}$ wide, and 8 or 10 inches long. The whole equipment is a patented appliance. The guard glass was gone. (Holds up water gauge.) There is a glass tube in there now. I will hold it up and show the jury where my face was when I was looking across. It was this way (illustrates). I was sitting on the left hand side, and I was sitting crossed over here, facing the glass with the reverse lever between my legs, backing the engine up and looking back and across too for signals from anybody, and just as I stopped I partially raised up; I was going to cross over on the fireman's side to see the conductor, whether he was ready to couple up, and that put me directly facing the glass, with my right eye directly opposite that slit. I took charge of engine 752 on July 27th or 28th, one of those dates, I do not remember which. I had the engine two round trips, I know; that would be two days to a trip; a round trip is two days. My schedule time to leave Raleigh was 7:30 in the morning, and I reached Aberdeen at 4:45, but we seldom got there on time. I would leave Aberdeen at 6:30 the next morning. The

morning I took this engine, 752, it was at Johnson Street, standing on the water tank track when I arrived there. It was my regular engine. I had been in passenger service, and when I came back they had taken my engine and given it to somebody else. I was called to take out the local freight with 752. I had been in
67 passenger work about two weeks, between Raleigh and Columbia. We have to report about 30 minutes before leaving time, and I arrived there at 7:00 o'clock, and I went to filling up the rod cups and doing various things, tightening up nuts or bolts; it looked like it was in pretty bad shape, and about 7:20 we ran out on the main line and backed down on the scales track where the local freight was made up. It took me 20 minutes to do the work I had to do on the engine, and you had to hustle to do what you had to do, to fill eight rod cups and tighten up the set screws. When I got up in the engine it was time to move it down to where I had to go, and I hit out and backed down on the scale track and coupled up to the local freight. I was leaving Johnson Street when I discovered that there was no guard glass in the Buckner water gauge. I was around by the Standard Oil Mill, between Johnson Street and the Union Station, pulling my train out. I discovered that the glass was gone, and kept running the engine, and went on to Aberdeen, and the next day I came back to Raleigh. I was running without a guard glass. Nothing happened to the water gauge; I used and operated it. I got back to Raleigh the next evening at 3.00 o'clock; came in on time the best I remember; around 3:00 o'clock. I got off the engine; brought the engine to the round house, and put it on the coal chute track, and as I stepped down off the engine Mr. Powie Matthews, who was the day foreman, came up and asked me how she was, and I told him she was a hospital, she was shaking and rocking and pounding the blocks, and the wedges needed setting up.

The plaintiff was permitted to testify over defendant's objection and exception:

I told Powie Matthews that the guard glass was gone and asked if he had any of them. He was the day round house foreman, and he said no, they did not have any here.

68 To this evidence defendant in apt time objected. Objection overruled and defendant excepts.

Exception No. 1.

Q. What position did he occupy?

A. Day round house foreman, and he said no, they did not have any here.

To the statement that "he said no, they did not have any here," defendant in apt time objected. Objection overruled, and defendant excepts. Exception No. 2.

Exception No. 2.

The duties of the round house foreman were to see that the proper work was done and to see that engines were properly equipped

to make successful trips. My duty with respect to the water gauge and absence of it, was to go to the foreman, and if the guard glass was gone to see him and ask if he had any, and to get a requisition and go to the store-room and get one; to get one and put in this slot. That was all I had to do when I got it. The guard glass was known as a shield. Yes, it was known as a supply. It was a supply. I obtained supplies of that character by going to the foreman or general foreman and getting a requisition signed by them and going to the store-room keeper and getting such water glass or lantern globes, torches, torpedoes, fuses or such as that.

Q. What did you say to Powhatan Matthews?

Objection by the defendant.

By the Court: To any statement as to the water glass the defendant objects; objection overruled; defendant excepts.

Exception No. 3.

A. I told him the guard glass to the water glass was gone, and he said they did not have any and did not keep them in stock, and they were in Portsmouth, but he would send to Portsmouth and get one. He said: "You will have to run her like she is."

I went to the wash-room and washed up and made out my report and time slips, and went home, and took her out the next morning. With respect to making out my report, the report was made after I notified Matthews that the glass was gone, and he told me to run it. I went out the next morning; that was on August 3rd, the next morning when I went out. I went to Aberdeen that day, and it was the next trip I made that I was injured, the best I remember. I did not go every day, Sunday came in between July 28 and August 3. Local freight does not run on Sunday. I did not say that I had made two round trips and part of another when I was injured, I was making the second. I was making my second round trip when I was hurt, I had made one round trip and was on the next one, and it was on the second trip that the occurrence at Apex was brought about. I took it out first on the 27th, and if on the 27th I went to Aberdeen on that date and came back on the 28th, and the 29th was Sunday, and on the 30th I went out again and came back on the 31st, but during that time I might have been called for a passenger run to Monroe. I don't know about that. I know I made two round trips, possibly three. I know that the pressure of 200 pounds was the proper pressure for that engine. As to whether or not this Buckner water glass with the protection of that thick piece of glass was in general use on railroads at that time, I only know that they were used on the Seaboard. I know that protecting glasses of similar character were in general use on railroads. I have never measured the dimensions of the tube, I will give an estimate. I would say it was 12 or 14 inches long and about three-eighths of an inch thick and one-half inch in diameter.

Q. State to the jury why you ran that engine out on the second trip without the guard glass in, Mr. Horton?

70 Objection by defendant. Objection overruled. Defendants excepts. Exception No. 4.

Exception No. 4.

A. Because I was promised I would have a guard glass when I returned; Mr. Matthews told me, and I was told to run her and I had to do it.

By the Court: Strike out what he was promised by Matthews, that part of it is stricken out, as that was a conclusion. You can say I ran it because of the conversation I had with Matthews.

A. That is right.

By the Court: All of the answer is stricken out and I will permit him to say I ran it on account of the conversation with Matthews.

Objection by the defendant. Objection overruled. Defendant excepts. Exception No. 5.

Exception No. 5.

I at times still suffer with this right eye when I take cold and it settles in it at times.

Q. Do you know what the standard rules are on railroads in respect to the vision of engineers?

Objection by the defendant.

Q. Do you know what the requirements are on railroads under the standard rules of operation in respect to the vision of engineers—the eye-sight of engineers?

Objection by the defendant.

Q. I will ask you this question: State to the jury whether you in your present condition in respect to the sight of your right eye you are able or capable to operate a locomotive engine?

Objection by the defendant. Objection overruled. Defendant excepts. Exception No. 6.

Exception No. 6.

71 A. No.

By the Court: Q. You can ask him why, if you want to.

By Mr. Douglass:

Q. Why?

Objection by the defendant. Objection overruled. Defendant excepts. Exception No. 7.

Exception No. 7.

A. On account of the condition of my right eye, impaired eyesight.

I can state what that is due to. It is due to being hit in it by flying glass from the water tube, on the occasion stated by me. After the injury to my eye I suffered; it looked like as bad as a man could. The first 15 days was the worst suffering. Then as time

went by it lessened more and more as the wound healed, and after about 40 days it was just at times I would have to drop cocaine in it or have Dr. Lewis give me prescription for about 60 days, and then I wore smoked glasses for about probably 30 or 60 days. At night I had to keep hot towels on it if I got any rest at all the first 3 or 4 nights, and then after that I would put 2 or 3 applications on my eye and that would ease me. As to going to bed the first 3 or 4 nights I would lie down but would have to get up. I was so nervous and it hurt so bad. I wore a shield over my eye for about 60 or 70 days, the shield and smoked glasses. I was without employment 9 or 10 months after my injury. I got employment after that, making inspection for the Wake Water Company, inspecting the town, at a salary. I started at \$15 a week. That lasted a year and 3 or 4 months, the best I can remember, and then I got a raise to \$17.50 a week, about the last 8 months that the Water Company existed before the city took it over. About a month and a half after the city got it, they got it last May, the commissioners were
72 elected along the first of July or middle of July, and they raised me to \$25 a week, the commissioners did. The city paid me the same salary for the 30 days, the first 30 days. They did not pay me \$100 a month, but \$25 a week. I am getting the \$25 a week now, but I do not know how long it will continue.

Objection by Mr. Allen for the defendant as not responsive. Objection withdrawn.

I am employed until next May under these present commissioners. I made an effort to get employment after this injury. I applied to Mr. C. H. Hix, general manager of the S. A. L. Ry., for employment and Mr. Stanley, who is the claim agent of the company.

Q. What reply did they make to you, if any?

Objection by the defendant.

By the Court: It is not a question of the reply, but whether he could secure employment.

By Mr. Douglass:

Q. State, Mr. Horton, if you failed to get employment with the Seaboard Air Line Railway on account of the condition of your eye-sight.

Objection by the defendant. Objection overruled. Defendant excepts. Exception No. 8.

Exception No. 8.

A. Yes.

After this injury I was not able to see the wound in my eye, I could see an inflamed streak in there with a mirror. I could pull it open and see a red streak across my eye by looking in a mirror. It was a red streak right across right under the bottom of my sight. You see my other eye was in sympathy with this, and I could not look at anything long at the time. At the time of the injury to

73 my eye my brother Ernest he ran with me and he waited on me at night and got me hot towels, and my mother and sister. He examined my eye, first and last. The insertion of the piece of glass in the slots described by me will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes.

Cross-examination.

Examination by Mr. Allen:

That is what the glass is for, for the protection of the engineer or anybody, this guard glass. I have the glass tube here that has been exhibited, and in this brass cage there is a glass tube like that one. This part of the water gauge (points) connects with the boiler, and all of the steam in the boiler of the pressure in the boiler comes down in that glass tube, and this end (points) is the water connection and the steam up here, so that the steam that comes from the boiler down in this tube, which is in the center of that gauge, is the same pressure as in the boiler. On this occasion it was at least 200 pounds of pressure that came from the boiler down in that tube, and at that time this guard glass was out. That glass by the movement of the water would indicate to me how much water was in the boiler. That was on the left hand side of the engine, of the cab, on the fireman's side. The engineer's side is the right hand side. On that side of the boiler were 3 gauges or gauge cocks, one situated above the other. They were right close at hand, about 2½ inches apart, and they were right close at hand to the engineer, and he could sit in his seat and reach and turn them. He could turn those gauge cocks and it would indicate where the water was in the boiler if they were in working order, but if he had muddy water, or if the water is muddy or bad, they will stop up. It is the duty of the engineer to see that they are in working order. Suppose they stop up on the road, you don't expect a man to stop on the road, do you, and try to blow them out? He can't

74 do that. With reference to the water, my engine was operated from Apex by Mr. Benton with the gauge cocks. Mr. Benton, the fireman, brought the engine in from Apex to Raleigh using the gauge cocks to tell how much water he had in the boiler. I took this engine out on the morning of the 27th of July the first. That is what I remember, it has been so long ago. When I returned on the 28th I made out a work report. That work report is made out by all engineers when they reach a terminal if they want any work done on the engine. It shows on that work report the defects on his engine that he wants repaired. The work report is placed on a file or in a box in the round house desk used for that purpose, then the foreman or the general foreman takes that and reads it over, and distributes them to the different machinists and the different class of mechanics showing the different work he wants to give to them. Going back to the water gauge, I did not say with pressure on that tube in the glass cage that that glass is liable to explode at any time. No, that is not so, I have

run those a year without them exploding. Yes, it is dangerous to run it without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with that Buckner water gauge. (Witness is shown a paper.) That is my signature, and that, and that. That is my signature.

Counsel hands witness paper and witness testifies:

It is a form for work report blank for engineers to make out at the end of the trip.

It is the report they make out when they want repairs made to their engine. The foreman takes that and distributes it out and the machinists make the repairs. (Witness is handed a paper.) The date of that is 7/28/10. That is the date I returned from my first trip.

I made out that work report and put it in the proper place. 75 The date of that is July 28. I made them both out when I returned from my first trip and put them in the proper place, and noted on there the work or repairs I wanted done on the engine. (Witness is handed another paper.) The date of that one is 7/30.

That shows that I took the engine out on a trip on the 29th and came back on the 30th.

The date of that is 7/30. I made out a work report on the engine on 7/28 and 7/30. I did not say that I made only two round trips, I said I know I made two and possibly three. I made out this work report on the second trip, and when the water glass exploded it must have exploded on the third trip. The report of 7/30 that shows the repairs I wanted made when I returned from the second trip, it shows the work I wanted done but it was not done. I did not make a report upon my return from the third trip. These two reports were made upon other trips than the time of the explosion of the water glass.

Q. Under the rules of the company at that time, I was required to report in writing the repairs I wanted done to my engine.

A. Of course, machinists' work but supplies you don't put that on work reports.

Repairs such as machinists do are put on the work report in writing as required by the rules.

I do not know whether the rules of the company say that verbal reports would not be noticed.

I do not know, but I know they are noticed. I have found many a defect about an engine and called a machinist's attention or foreman out there and fixed them. I have called them out there when 43 was standing on the main line and had them repaired. The defects I wanted repaired I put in writing, the biggest ones. Yes, I talked with Mr. Matthews and told him that this engine was a wreck. I called his attention to most of the items on there. You could hear the engine pound two blocks. (Witness is handed 76 a paper.) I have inspected this and there is no reference on there to the absence of the guard glass, and the reason I did not put it on there was I found out from Mr. Matthews that they did

not have any, and it wasn't any use to put them on there. (Witness is handed a paper.) I have looked on here and there is no report of the guard glass being gone. This was the return from the second trip. Yes, I was examined in the office of the master mechanic. No, I did not tell him that the reason I did not put it on there was because I had reported it to Mr. Matthews, I said for reasons best known to myself. When that question was asked me in the master mechanic's office that is what I replied. As to whether I was asked the question, according to your statement, this fixture was not equipped with the guard glass when you made the first trip on the engine, July 28, had you made any report as to this fixture not being equipped with the guard glass, you were asked that question, weren't you? I do not remember. And as to whether I answered No, I do not remember about that. As to being asked the question Why? I was asked the question why I had not reported it in writing, and that was Burrus, the chief clerk, and I said for reasons best known to myself. (Witness is shown a paper, Exhibit "T"—That is my signature, I signed that paper.

Exhibits "C," "D," "E," and "F" are identified by witness and are marked by the Court.

At the time I was examined about this matter I was in Mr. Bissett's office, the master mechanic. He had the callboy beating on my door before day it seemed to me, and he was there 5 or 6 mornings before I could make a statement. I think I went down in a week or 10 days. I was not examined before the master mechanic, it was the chief clerk, Mr. Burrus. I did not put it down in writing, the stenographer did, typewrote it and I signed it. I signed the typewritten statement that was made at that time. When I ran on the local freight I would spend a night in Aberdeen and a night in Raleigh.

77 Well, yes, I had my expenses to pay in Aberdeen for my room, but we boarded on the cab, and we figured out what the groceries were we bought at Sanford and we figured up what it was at the end of the month.

Me and the fireman roomed together in Aberdeen. I think we paid \$6.00 between us. You see, we were only in Aberdeen every other night. There are two local freight crews and the room rented for \$10 or \$12 a month, and me and my fireman slept in it one night and the other crew slept in it the next night. I think it cost us \$2.50 or \$3.00 each a month.

My board would average from \$3.00 to \$4.50 a month. It varied, of course, at different times. We did not get but one meal a day on the cab, that's going and coming.

I had a room here in Raleigh, and when I left here going south we got supper at Aberdeen. For dinner, we usually carried lunch. Coming back, we did not get any dinner unless we bought a little knick-knack. We did not buy it if we were on time unless we were awfully hungry. The run was best coming back, and we made it fast, as we were anxious to get home. Sometimes, not often, probably once a month, I would be late in the evening. It would have to be a derailment or wreck or engine failure or something or extra move-

ment of freight. We usually came in here on time. We were due here at 3:30, and we did not miss it but one time in two months. I was not paid by the runs I made, but was paid by the trips, miles and hours. As to extra pay connected with the job, there was plenty of over-time, make all of the overtime you wanted, more than you wanted. I was not paid monthly, I was paid by the mile and hour. They paid me every 16th of the month. That would give me a check for whatever was due. I would go to the agent's office and sign for the check and carry it to the bank. That would show the previous month's work. That would usually show the amount due, but I have had checks short. At the last of the month if you put in a trip

late, that might be too late and so then they would put that
 78 in the next month's check. They would figure all that was due in one month and put it in one check unless the check amounted to over \$200 and then they would give you two checks. I have drawn two checks several times. I averaged from \$165 to \$190 a month. I made that for the year prior to August, 1910, I made more than that sometimes; that was just an average. So far as laying off, this was my run and I could work every day if I wanted to. Answering your question, "taking the 12 months previous, would you average \$165," I will say I was not on that run all of the time. I ran from here to Monroe part of the time on Red Ball freight. That paid more. I took that run some months before, 4 or 5, and that run would average \$165; I would make \$140, \$160 and \$190, and some months I would lay off part of the month. My average would run from \$165 to \$190 if I ran all of the time. I testified that I would average \$165 to \$190 a month. That was what I was making so far as I know, but some months I would lay off during that time. I do not know exactly what I made. I know Mr. Douglass asked me what I made, not what I could have made. I have made as high as \$20-. I averaged from \$165 to \$190. I do not remember whether I swore on the last trial that I averaged \$165.

I do not remember whether I testified to that at the last trial. (Witness is shown several, 12, pay checks.) I identify my signature on those checks. They are the pay checks for the period shown.

I will look through them and see if there were not times within the year prior to August, 1910, in which I only made \$90 a month, between \$90 and \$100?

I have looked at that and refreshed my memory, that is only \$91.68. I may have dropped out a few trips that month. I could have made more than that if I worked. That shows that I made \$91.68 that month, here is one \$139.43 and here is \$140.15 and here is one \$91.05 for the month of March, 1910. Here is one \$147.01 and \$172.15. I cannot tell if that is the highest, I have not
 79 seen them all. \$132.76 and \$132.50. This must have been the one I only worked the 4 days, \$27.67. \$174.16 is the highest one in there. The lowest is about \$90. The period that covers is that last 12 months that I worked for the Seaboard. These checks will show what I averaged during the last 12 months.

By the Court: The witness in this case having testified that these

particular checks which were handed to him were the actual amounts that he received from the Seaboard Air Line for the months therein stated for his services as locomotive engineer, counsel for the defendant having asked him to sum up the 11 months prior to his injury and state what the general average was, the plaintiff objects. Objection overruled. Exception.

\$138.10 not counting the part of the month for August.

I am now working for the city as meter inspector. I do not read meters, I overhaul them. I am a mechanic, and work on the water meters that are placed around in the town. I do that work at the water tower in the workshop. I repair all defects in the meters. They are brought for me to put in proper repair and see whether they are working properly. I test them. When I first went to work for the water company I read meters, up until the city took the plant, and they began to buy a lot of meters and the work got so heavy in rebuilding the meters I was needed for other service. A boy can read a meter, and they relieved me. Before being employed by the Wake Water Company I was employed by the Democratic Headquarters. I had charge of the Straight Democratic Headquarters, there were two factions. I made \$25, I could have made more if I had double-crossed. I mean by that a certain faction offered me a certain sum of money to give them some information. They offered me to sell out, and offered me a pretty flattering piece of money, \$250.

Objection by Mr. Douglass for plaintiff.

By the Court: I do not think it is competent.

I do not recall making other money during the 8 or 9 months spoken of. I am now making \$25 a week. No, not \$1,250 but \$1,300 a year, 52 weeks. I make \$1,300 a year. The Seaboard Air Line Railway did have a store house down here at Johnson Street when I worked there, I suppose so now. I say they did at the time I was working there. The general storekeeper was in Portsmouth.

At that time the Seaboard had two passenger trains each way between Raleigh and Portsmouth.

It had two each way, 32 and 33 and 38 and 41. They were the regular trains from Portsmouth here.

32 was going towards Portsmouth and left here about 2:20 at night or 1:40 and got into Portsmouth about 8:00 or 8:30 in the morning. 33 left Portsmouth about 8:00 or 9:00 o'clock and got in here next morning about 2:00 or 3:00. The Seaboard passenger train made a round trip each day.

The trains of the Seaboard at that time I was employed with them were operated under rules. (Witness is handed a book of rules.) I am looking to see if it has a date on it. Yes, that is the book of rules in force at the time. Rule 668 was in force at that time.

Q. And wasn't there a rule in force at that time requiring that an engineman must report to—

Objection by Mr. Douglass for the plaintiff.

By the Court: That puts it so you can introduce anything in that book. He states that these rules were in effect at that time. I will identify the whole book, and counsel can offer such rules as they desire.

By Witness Horton: I went to Dr. Whitaker about 30 or 40 days after I was hurt. He is an eye specialist here. I paid him \$5 to examine my eyes and tell me their condition. I have never been back? Yes, I have talked to him. I have been back for treatment. This spring I went back for a prescription, but I wasn't there 10 minutes. At the time I filed my complaint, I suppose I had paid \$5 or \$10 for medicine and doctors. I do not know whether I had spent \$6.55 or not, \$5 for medicine [?] and 65 cents for
81 medicine. I do not know exactly, Mr. Allen, or I would tell you, but I can not remember exactly. Yes, I was asked the question and answered it that I paid Dr. Whitaker and Dr. Horton \$5 each for examining my eyes and 65 or 70 cents for medicine, and paid Dr. Horton \$5 after the suit was brought. Dr. Horton examined me just prior to the other trial in 1912. I paid him \$5 for that examination. I did not go back for treatment. I said I ought to wear lens glasses. I swore to that complaint. Yes, I swore in that complaint that I had spent large sums for medical attention and medicine. I did belong to the Brotherhood of Locomotive Engineers and do now and am in good standing. At that time I did belong to it. The Brotherhood of Locomotive Engineers had a working agreement with the railroad. (Witness is handed a paper.) I have looked at that paper. It is a copy of our agreement or contract with the company. I had a copy of that. That was the contract with the company that was in force at the time of the injury.

By Mr. Douglass: We object to that. You must identify your paper.

The paper in question is identified by the witness.

When I came back to Raleigh from the last trip on August 4th, I went right to the washroom, took off my overalls and washed my face and changed my clothes before coming up town, and put my overalls in my grip and I had a cupboard in the washroom and put my grip in there. I do not remember whether I came up town that night, I suppose so. I did not testify before that I went to the ball game the next day, I did not say the next day, but if I was able to get there, I was there. I don't know whether I went to the ball game the first or second day. I do not remember the day, but if I could get there, I was there. Raleigh had a ball club at season. When that inner tube exploded in this water glass hot water and small pieces
of glass and steam filled the cab until it was closed off.

82 The Buckner glass is a safe water gauge, with the guard glass in place.

That is an important part of the Buckner water glass. That, so far as the protection of the engineer is concerned, is the most important part. That is valuable, when it is in the proper place, simply because that glass affords protection to the engineer. When it is

out of the proper place, the water glass does not afford proper protection, this Buckner glass does not. The connection was so arranged with the boiler that you could cut off the steam entirely by that valve. It was so arranged that you could cut off the water entirely by that valve. That would cut the glass out.

Of course, there would be no danger. I could have cut off the water and steam by simply turning these two valves.

I don't know that engines have been run with the gauge cocks a long time before the water gauge was ever put on them.

Objection by the plaintiff. Objection overruled. Exception.

I don't know that. Every one I was on had a water glass.

Yes, you can operate an engine without a water gauge, but with the water cocks, but not as well. You can not keep these cocks open. They are liable to stop up, but a water glass has got so much bigger opening here than the gauge cock. They are the safest things at all, as they do not stop up like the gauge cocks, like all of the gauge cocks I have seen. I have run an engine many a time with the gauge cocks stopped up. Yes, you can run an engine without the water glass and with the gauge cocks if they stay open. I could have run this engine without the water glass and with the gauge cocks if they were in working order. Were they in working order or not? My opinion one of them possibly was working all right. I think possibly a little steam would come out of them. I don't think I made any report at that time of the gauge cocks. I went by the water glass.

83 Yes, it was my duty to report on that engine, but the water was muddy. We just got the drainings from Johnson Street. It was my duty to report the gauge cocks if they were not in working order. I do not know whether I saw each morning that the gauge cocks were in working order. Whether it was my duty to do it, depends upon whether I had time or not.

In that 30 minutes I filled up 8 rod cups with grease, and took and oiled the engine around and looked at the valve stems and eccentric. You got about 20 or 30 minutes' work before you can get up in the engine. The first thing an engineer does is to set his grip up there and tell the fireman to hand him a wrench and oil can. No, the first thing I see to it not the gauge cocks, but the first thing I do is to open the fire door and look at the crown sheet. No, the next thing is not to look at the gauge cocks, I look at the water glass. Was it my duty to see that the gauge cocks were working? It was the round house duty to see that they were working. Was it my duty to see that they were working before I went out? If they were not working they would tell you to go on. They would not take an engine back in the round house and blow it out. It was not my duty to try the gauge cocks, I used to look at the water glass. I noticed that the guard glass was gone when I was out of Johnson Street, around by the Standard Oil Company. We were going this way (pointing) and the sun was plainer around there in the morning. I noticed there that the guard glass was gone. I knew it was dangerous to an engineer's eyes. I did not cut out the glass. I guess I tried the water cocks, I must have. I think I did. I went to Aberdeen, made the

round trip and returned on the 30th with the guard glass in that condition. On none of these trips did I cut out the water glass and used the gauge cocks. The opening of the gauge cock is not the same as the opening of the water glass. It is a small copper pipe, a size smaller than this (indicates) and is easily stopped up. You can not turn the steam on them and blow them out, not if they are

84 packed up with mud. You can clean them out and do clean them out by running a piece of wire in there. I did not cut the water glass out during the time the guard glass was gone and I was running this engine. I did not attempt to cut it off, I needed it. I did not attempt to run my engine without it. Yes, I had a water glass to explode with me once before, or rather the man I was firing for did. I don't remember whether it was in 1902 or 1903. It was in Anson County, near Russelville, a pass track, where it exploded. No, the glass did not hit my eye, the hot water and steam did. I lost two round trips. I think it paid \$2.40. When that glass exploded it blew glass all over the cab.

(The witness upon request exhibits his eye to the jury.)

Q. Without that guard glass in there, did I know that inner tube would be liable to explode and hurt somebody?

Objection by the plaintiff and objection is sustained as the question has been asked and answered a number of times.

By the Court: I will let him answer it one more time.

I knew that with that guard glass out that the tube was liable to explode with the 200 pounds pressure on it. I knew that it was liable to explode, but I could not tell when.

It was liable to explode at any time. No, I did not know if it did explode without the guard glass that it would be liable to hurt the engineer, as I have seen lots of them explode without hurting the engineer. Yes, the guard glass is there to protect the engineer, I have told you that.

After this accident I thought I was able to run an engine.

Yes, and I am now, and I can run an engine with any man in the world, if I can get a job. I don't stand aside for anybody, and my record on the Seaboard will show it.

And right now I can run an engine with anybody. Yes, if I can get a job, but I can not get the job.

85 Redirect examination.

Examination by Mr. Douglass:

Q. You said something about handing in a large list of repairs to be done to the engine on the day before this injury to your eye?

A. Yes.

Q. Did they do that work?

A. Not a bit of it. I believe they did open the sand pipes.

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 9.

I was asked awhile ago about going to a ball game. I went to the ball game. I could see well enough to see that Mr. Allen was there. I think he was there. I think I spoke to him and he asked me how I was. I had a bandage on my eye. I used cocaine and salve in it, which eased it temporarily. I carried my eye dropper and cocaine in my pocket.

Q. Was it your duty under the rules of this company to put the missing gauge glass on that work report?

Objection by the defendant on the ground that the rules themselves require that they be in writing. Objection overruled. Defendant excepts.

Exception No. 10.

A. All that is necessary is to go get a requisition.

Q. Was that repair within the rule requiring it to be in writing?

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 11.

A. No, it is a supply.

Q. Is there any rule requiring a written report for a supply?

A. No.

86 Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 12.

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass?

Objection by the defendant. Objection sustained for the reason that this has been over on both the direct and cross examination.

By Mr. Simms: Does your Honor understand that it is in the record that it was more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the Court: Yes, he said that, because they would stop up.

To the foregoing statement defendant in apt time objects. Objection overruled. Defendant excepts.

Exception No. 13.

Q. Who was it you say examined you about this matter?

A. Chief Clerk Burrus.

Q. Did he have any right to examine you about it?

Objection by the defendant.

Q. The Court says you may explain why you told Mr. Burrus you did not report that guard glass for reasons best known to yourself.

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 14.

87 A. He asked me why I did not put it on my work report and the reason was because I had been to some one higher than him and he said he did not have any. Mr. Matthews was higher than—over Mr. Burrus.

By Mr. Allen: I will ask your Honor to strike that out.

By the Court:

Q. Didn't you say you told him that right there?

A. No, I did not tell him that.

By Judge Biggs: We ask your Honor to strike that out.

By the Court: I will leave that in and give you an exception.

To the refusal to strike out this evidence, defendant objects. Objection overruled. Defendant excepts.

Exception No. 15.

By Witness Horton: Mr. Allen asked me about my earnings. I did not accept the \$250 offered me, as that would have been selling my principle. I will state that the cost of living has increased since I boarded as I testified to at Aberdeen.

Recross-examination:

Yes, I was examined in April, 1911, at the first trial. Replying to your question if I said anything at that time about Mr. Matthews telling me to run that engine that way, I told you at the last trial if I did not say it I intended to say it. I cannot remember everything I said. It was 4 years ago. I cannot remember whether I testified that I ran the first time to Aberdeen and upon my return to Raleigh I asked Mr. Matthews, the foreman, if he had any glass and he said no, that they were put in in Portsmouth and he had none; that he was the foreman at Johnson Street. I do not remember saying on the first trial, in answer to question, "When did you say anything to Mr. Matthews about the guard glass being out of the gauge?"

88 that it was after the first trip or second trip I ran the engine.

I do not remember saying that I asked him if he had any Buckner shields, and he said no, that the glasses were put in at Portsmouth. If I did not say in my first examination in this case that Mr. Matthews told me to run the engine like she was, I intended to, I do not know whether I said it or not. I did not say at that time upon my return on August 4th, that on that afternoon I went over to Mr. Charley Murray at the Baker Thompson Lumber Company and asked him to cut me a glass. I did not testify that at the last trial. Yes, I asked him, but I did not do it on August 4th. That was after I came back from the first trip, that I asked Charley Murray to cut the glass and after I talked with Mr. Matthews. Charley Murray was glass-cutter at the Baker Thompson Lumber Company. It was not my business to ask Mr. Matthews to cut me a

glass. No, I did not ask Mr. Matthews to cut me a glass, but I did ask Mr. Murray. I swore the last time that a piece of glass could be cut, a thick piece of glass and fitted down in there. That's how they are made.

JAMES T. HORTON, the plaintiff in this case, having been recalled, testifies as follows:

Redirect examination:

Objection by defendant to the recall of this witness.

(By Mr. Douglass:)

Q. State to the jury what you meant in your cross examination by saying that you could run an engine as good as you ever could?

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 16.

89 A. I meant I knew as much about an engine mechanically as I ever did, but I could not see to run it.

Objection by Judge Biggs for the defendant to this answer. Exception.

Recross-examination.

By Mr. Allen:

I said I could run an engine as good as any man mechanically.

I did not say mechanically, but I do say it. I said I could run an engine as good as any man.

Dr. M. C. HORTON, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Douglass:

I am not related in any way that I know of to Mr. J. T. Horton. I am a graduate of the medical college and practice on the eye, ear, nose and throat.

It is admitted that Dr. Horton is an expert.

I have been practicing on the eye, ear, nose and throat for 7 years in Norfolk, New York and Raleigh. I was raised out here in Wake County, Wakefield. Have had occasion to examine J. T. Horton's right eye. Do not exactly remember the date, it was in 1912. Found a scar running across the cornea, that is the part of the eye that shows dark across in front there, diagonally across, at about an angle of 120 degrees. Shall I make myself more explicit. Witness makes drawing on paper. I will make myself as explicit as I can. You have a circle and the vertical line is 90, up and down this way, and this is 100, and so on, down here, and that was 120 here. There was a linear

scar. This is 180 and this is 90 and this 90 is supposed to be vertical, and this 180 horizontal. This line runs across the cornea at axis about 120, and extends almost across the entire cornea.

The cornea is the transparent portion of the eye concerned in refraction, the anterior portion of the eye consisting of no blood vessels. It is the transparent portion of the eye. In respect to the sight, the cornea refracts the light. The effect of such a scar upon one's sight, a scar upon the eye there, passing as it does across the central portion, so there is possibly a smoky effect, it is translucent, this scar is, and naturally the rays of light do not pass through that scar as readily, and even if they do pass through they are not accepted or interpreted as light, in other words, you can not see through a translucent body. It is as if you breathed on a window pane. It not only has the effect of not being able to see through that translucent part, but there is a certain amount of contraction in the line of this linear scar. There is always contraction where there is scar tissue. That is brought about in the healing process. The cornea has no blood vessels and therefore it has not healing properties. It has not the capacity to heal like your hand or anywhere else which is external. There are no blood vessels in there, as it would be impossible to see through them. I am speaking of the first time I examined him. In this axis there is a contraction. It is rather hard for me to say what I think and make myself plain. A contraction in the axis of 120 shortens the meridian in the opposite direction, doesn't it, but it does not shorten it in the axis 120. If I take that handkerchief up this way at 120 it does not shorten at 120 but it shortens it up this way. It makes the line of shortening in an almost exactly opposite direction from the line of the scar. It naturally does that, because it simply pulls across this way. The effect that has upon the sight or vision, that has the effect of shortening here, and has the effect of producing an astigmatism where the rays of light do not focus in the same point on the retina. You ask me, Is that in addition to this smoky appearance that the scar causes? That is purely a result of the contraction in that meridian, makes one meridian of the eye shorter than the other. The scar tissue makes that shorter, and it naturally makes that smoky as the rays of light do not pass through there. The condition of that eye has the same effect upon the distance or nearness of vision. At this examination I measured the amount of the astigmatism incident to this contraction across here. We oculists have some fractional estimates by which we express the condition of the sight. The normal vision is 20-20, that means by actual measurement of the eye, putting a patient at 20 feet distant, the letters are measured by the angle of the vision, so to speak. We use a unit of measure. It is a unit of measure and means nothing as accepted by the profession all over the world measuring by this angle of vision, and we say a person who sees a line there, a certain size, at 20 feet, represents normal vision, that is 20-20. In my examination of Mr. Horton, the figures I used to express the vision in his right eye, if I recall correctly, was 20-70. That means, 20-70 means, we have 20-20, 20-40, 20-50, 20-70, 20-100, 20-200, and all of these letters are graded in proportion. 20-20 is normal,

20-40 is one angle larger, and 20-50 is another, and 20-70 is the third. 20-70 simply represents that the man sees the lines that are measured and have been accepted as standard vision, being measured 20-70 at 20 feet and graded from 20-20 on down, 20-40, 20-50 and 20-70. He would have to stand within 7 feet of the object to see the 20-20 line. I had occasion on the 22nd of this month to examine Mr. Horton, at which time I examined the scar in his eye. With respect to the other examination, the scar, so far as I could make out, was practically the same thing. Of course, there is no increase in the size of the scar. There was a slight increase in the amount of the astigmatism, showing the scar tissue had contracted a little more. That was in the healing process. Naturally, there is a contraction in the healing process. As to whether at the time I first examined this

92 eye in 1912 it had not ceased its efforts to heal, that is a matter you could not determine. It was not fully organized, but it was almost impossible for me to say at that time. I say now that there is more astigmatism than there was before. I say that from my observation. I made the same tests at this time as I made before for 20 feet. I found as a result of that test as to the condition of his vision it was bar 20-100, what we call 20-100 plus. That means that the eye had gone backwards in its ability to see from 20-70 to the next column, to 20-100. When I say 20-100 plus, it means that he saw two letters on the 20-100 column. That is poorer vision than 20-70. From my observation and examination of the scar, I could not have told from observing the scar that his vision had decreased. I could not tell from that. The scar was larger, I mean no larger and the general appearance was the same. I could not tell a year ago that there would be any increase in astigmatism when the eye got well; with the condition of the scar at present, resulting from the healing condition of the eye referred to, it is a quiescent condition. In my opinion this condition of the eye, in respect to the scar, is unquestionably permanent.

Cross-examination.

Examination conducted by Mr. Allen:

I could not say just the length of the scar. It extends practically across the entire cornea. I did not measure the length. I could give you an estimate I should say that it was about between 5 and 10 milli-meters: I will give it in inches, I would say about $\frac{1}{8}$ of an inch. That is an estimate. I did not measure the length of the scar at all. It is a guess, it is between $\frac{1}{8}$ and 1-16, it is about that. About $\frac{1}{8}$ would be my estimate. I examined his other eye. That is practically normal, 20-20. I am not absolutely sure, but I think there was a little astigmatism in the left eye. Astigmatism is not a disease of the eye, it is something that is a defect in the eye that is frequently found in normal people. It does not mean an injury. It can be corrected by glasses, that is the method I adopt for correcting astigmatism.

Glasses are the proper method of aiding this astigmatism. Glasses improve the condition. I mean by improve to get better vision.

Very frequently you can bring an eye in which the astigmatism is to almost normal by the use of lens. I did not treat Mr. Horton, just made an examination. I do not know the date of the first examination, whether it was May, 1912, or not, but it was in 1912. He came to my office and I made the examination and he paid me and left. He came to me this week, he was examined again. I did not treat him or fit lens for him. That scar is not noticed in a casual examination of Mr. Horton's eye. I would hardly say you could see it unless you stood in front of him and look at him. I had absolutely no means of telling what caused the scar, or what caused it. I could not tell how long it had been there. I could not tell whether it had been there 3 or 4 years. If it had been very recent I could tell it. I could tell within 3 or 4 or 5 months. I could not tell how long it had been there. In this examination you put up the cards with the letters on them, and the patient sits off a certain distance and I obstruct the vision in one eye and then the other and ask him to read, and he says what he can see, and then I move again and he says what he can see, and in the final analysis you have to judge by what he says he can read. When I examined him this last time at 20-100 plus, he told me he could see some of these letters upon the line, but could not see other lines, and at 20-70 he told me that he could not see the letters upon that line with his right eye. Yes, he told me at 20-70 that he could not see the letters upon that line. No, the difference between 20-70 and 20-100 is not the difference of 30 feet in his vision, it is the difference between 100 and 70. It is simply a matter of the size of the letters. We never vary the distance in feet. It would be hard for me to tell you the difference in the size of the letters. I mean I can tell you in geometric proportions. Those letters are scaled, beginning with small and getting larger, one at 70 and one at 100, the next from 70 is 100, and back the other way is 50 and 40 and 20. The patient sits at the same place. The difference in the size of the letter represents the difference in the angle of vision. We put the card up there and the letters are arranged upon it, 20, 40, 50, 70, 100 and 200, and the patient sits at the same place, and frequently we have only one row up there, and pull a string and revolve the case to bring the next line in view. He read the 20-70 and he was 3 letters above the normal, 20-40, 20-50 and 20-70. In the next examination he read the next one above, 20-100, part of the next one above. By moving him nearer he could see the smaller letters. In absolute figures that represents that a man could see, say at 20-70 he ought to see 20-20 about 7 feet away. That is an estimate. He would not necessarily have as good vision as anybody at 7 feet away for those letters, but I mean, ordinarily speaking it would. A man who can see 20-70 at 20 feet, if you bring him up to 7 feet he could read it. 20-20 is normal. Yes, I said that Mr. Horton could read that with both eyes open, but I am not sure just exactly what it was with both eyes open. Yes, that would be what his left eye could read to a certain extent. Even though he could see 20-100 with his right eye and 20-70 with his left eye, with both eyes open he could see better than with one eye shut. Both eyes being normal, he can see as well with one eye as with both eyes, nearly so. That means that a man can see with his good eye, it

is a matter of practice, I think. If he had only one eye and that normal, he would see as good as with two, that is, in the line of vision, not in the field. I mean in his line of vision his vision is practically the same as both eyes. The causes of astigmatism is the elongation or shortening of one axis of the eye. As to what produces astigmatism, heredity, syphilis, gonorrhœa, forcible delivery at
 95 birth, uncorrected refractive errors, the eyes may need glasses and they do not get them and they strain the eyes, poor lights at schools, improper positions at school desks, anything that would tend to strain the eye at all is liable to produce an astigmatism.

Redirect examination.

Conducted by Mr. Douglass:

Traumatic injury will produce astigmatism. A wound in the eye would produce it. I would not give my opinion as an oculist as to what extent I could bring back that right eye with glasses as I did not try. I could not aid the vision in that eye as to the smoky condition, but how much it would correct the astigmatism I could not say. There is no means of aiding or removing the scar. No, an injury in the right eye could not produce astigmatism in the left eye. The straining of that right eye to see would not produce it. I say no, that would not be liable. In a child the chances for astigmatism are good, more so than in a grown person. The orbital cavity, the eye socket, at maturity, with all of the bones well-formed, forms a better protection than when a child is young. In a grown person, with the bones well-formed, the chances of production of astigmatism are almost nothing. There is a chance for the production of astigmatism in the formative period, but hardly in a well-developed man, with the bones in shape. There could not be any giving-away. I have no way of estimating what produced the astigmatism in the right eye. I only know it exists. My opinion after seeing that eye with the scar in it, I will say that it is possible for the astigmatism always to have been there. It is possible it was not there. I could not say.

Q. When he went up there for examination, he told you how his eye got hurt?

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 17.

96 A. I think he did. I don't remember what he said, but it seems to me it was an explosion of some kind. I am not sure about that. In reading those letters, you have to [in] a large measure take the patient's word, but he does not know what line you are going to put down there, he does not know whether it is 20-70 or what it is.

Witness was asked to state if upon his examination of this eye, this right eye, as to whether in your opinion his ability to distinguish the writing was consistent with the condition of his eye, in the opinion of witness.

Objection by the defendant.

By the Court: Well, gentlemen, he has stated that the injury as he found it in the eye would produce astigmatism but that he would not venture an opinion as to whether that particular injury did produce it.

The astigmatism in his eye is not the only cause for his inability to see. The scar is there. The scar itself produces an inability to see through that scar tissue. I would unquestionably say that his inability to see through the scar tissue and the astigmatism I found there would reduce his sight to the extent of 20-70, I mean the 20-100 plus. That is my opinion.

Recross-examination.

Conducted by Mr. Allen:

I am not absolutely sure the first time I examined Mr. Horton that he told me that he had a claim against the railroad, or at the time he told me how this accident happened to told me he had a claim against the company. I knew it, though. I could not tell when he said the water glass exploded, whether it was in 1903, I could not tell when he said it exploded. As I remember it he said it was a water glass, but I am not sure about the time. I am not sure when he said that the thing exploded. He did not mention it having exploded but once.

97 J. A. MASSEY, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Douglass:

I live in Raleigh, and in 1910 I was clerk in the store room at Johnson Street for the Seaboard road. I had charge of the store room. They kept in there supplies in general for the Seaboard road, the First and Second Divisions. I stayed there 17 months in all, but I do not remember the day I went in there. I think I know what the custom and practice was when supplies were needed by engineers on their engines.

Q. What was it?

Objection by the defendant. Objection overruled. Defendant excepts.

Exception No. 18.

A. The man in the store room furnished the supplies upon requisition. The requisition was brought to him, and it had either to be signed by the Master Mechanic, General Foreman or the Foreman.

I know who applied for them, the engineers did. They would apply to the Master Mechanic, General Foreman or the Foreman. I know about the Buckner Water Glass guard glass, I have seen it up here. Yes, the glass in the Buckner glass was a supply. Yes, that was a supply. I did not have any Buckner water glass guard

glasses in stock down there on August 4, 1910. I did not have any between July 27th and August 4th.

Cross-examination.

Examination conducted by Mr. Allen:

98 I do not remember the exact date I went there. I was there 17 months. I do not remember how long the Buckner water glass had been in use on the Seaboard, or whether it had just been put in on the Seaboard. I was in the store room. I did not have any of the guard glasses there. There was other glass in the store room, headlight glass and glass for the lamps on cabs. It has been some little time since I was there, and I do not think all of the headlight glasses were of the same thickness. We had different thicknesses. (Hands witness a piece of glass.) I cannot tell you if that is a piece of headlight glass.

Yes, we had glass there that would compare in thickness to this. I could not tell you what this is cut off. The headlight glasses we had there were the regular size for headlights. Much larger than the length of this.

Q. And you could have cut this piece of glass out of a headlight glass?

By the Court: How is that pertinent?

By Mr. Allen: We have shown that they had headlight glass in the store room, and I will show that that guard glass could have been easily cut from this glass in the store room.

By Witness Massey: Mr. Allen misunderstands me. We had only pieces that had been cut into the shape of a headlight. We did not have any pieces of glass of that thickness.

The headlight was of this thickness and much larger. I have forgotten the dimensions, I think some of them were 18 inches or 2 feet across. The general storekeeper of the Seaboard is in Portsmouth. I got my supplies from him, the supplies for Raleigh came from Portsmouth, shipped from Portsmouth to Raleigh by freight. Requisition was made once a month on the Portsmouth end for the supplies for Raleigh.

Q. The rules of the company require that the work report of engineers for the purposes of repairing defects and getting
99 necessary appliances for engines should be made out in writing?

A. That was the rule. So far as I remember, Mr. Allen, my recollection is that pertained to the work that was done by the machinists, but the supplies had to be gotten out of the storeroom strictly and rigidly by requisition. In case of notice of defect or necessity for supplies [?] was put upon the work report by an engineer, the machinist would come to me and get them. Sometimes the machinist would come and sometimes he would send his helper, or if he had an extra man, they would send him and I would fill it. Yes, it would come from the machinist. There were different departments there, and it depended upon what they

wanted. If I had to furnish supplies for the conductor, that came from a different department from the engineer. If the absence of an appliance was inserted upon a work report and that was put in the round house and the round house foreman got it, he would send to me to get the appliance to put upon the engine. Whatever was put upon the work report that had to be gotten out of the store room, that had to be brought to me. It would have had, though, to be signed by the foreman before anybody got it. When these work reports are made out by an engineer covering any defects on the engine or appliances needed, they are put in the round house and the round house foreman or somebody in his office gets them and gives [them] to the machinists. They are distributed to the machinists. If a machinist found on that work report that something from my department was needed, he would go and get it. He would come to me with a requisition and get it. By a requisition I mean a written order.

Redirect examination.

Examination conducted by Mr. Douglass:

If he wanted a lamp, or a flag, or a torch, or torpedoes, or a piece of glass to drop into one of these guards, he would report it either to the master mechanic or the general foreman or the fore-
100 man and ask him for a requisition for whatever article he wanted and bring that requisition to the store room. He would get that directly, and not through the written report of the engineer for repairs. That would be gotten directly.

Recross-examination.

Examination conducted by Mr. Allen:

I have never had a call for a Buckner guard glass in that way, similar to this thing here in dispute.

We did not have any in stock, and, therefore, no requisition was made for them. I know how the stock in the store room was handled. There was about \$3,000 worth of stock. In speaking of the stock in the store room, I am speaking of the mechanical parts of the engine. Any mechanical part of an engine for keeping the engine in repair that was in the storeroom was let out only on requisition, a written order, from the three men mentioned. I am not now connected with the Seaboard. Am in the insurance business.

The plaintiff rests.

Motion for nonsuit by defendant. Motion overruled. Defendant
excepts.

Exception No. 19.

W. S. BENTON, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I live at Hamlet. Am employed by S. A. L. Ry. as engineer. Have been an engineer going on 4 years. Before that I was a fireman. Was fireman on August, 1910, on local run out of here, between Raleigh and Aberdeen, same run Mr. Horton had. I fired on engine

752 the first morning he took it out, that was the first run Mr. 101 Horton made with that engine. Yes, when I took charge of that engine on the morning of that first run, the water-glass had a shield or guard in front of it. It was in there on the first morning I took charge of the engine. On that morning I took the glass out to clean it and it was hot and I laid it down, and we backed up to the train, and when we coupled up to the train it was lying on the apron, the place where we keep the oil cans, and that knocked it down on the floor and broke it. When that happened we were standing on the scale track at Johnson Street where we usually got the train. We were about 20 steps from the master mechanic's office at Johnson Street. The train had not pulled out. Mr. Horton was engineer at that time. The guard glass was smoky or dirty and I took it out to clean it. (Hands witness piece of glass.) That is the glass that fits in here. That is the kind of glass that fell off and was broken that morning. We went on to Aberdeen. I suppose Mr. Horton knew that the guard glass was broken there that morning. I did not call his attention to it. He looked down at it, I thought, when it dropped.

Yes, he was there on the engine. When Mr. Horton and I got out on the engine the guard glass was in the socket in the gauge, in its proper place. I could not say that Mr. Horton saw it drop and break. He was about 2 or 3 feet, I reckon, to it when it happened. When it fell I made the remark that it broke. He did not make any answer. I was 2 or 3 feet from him. I was on the engine on the return trip the next day. I was with Mr. Horton when he made the next trip. I was with him on the last trip he made. I was on the engine at Apex that afternoon of August 4th. I was at a store at the time Mr. Horton said the water glass exploded. I was not on the engine. When I came back I ran the engine from Apex to Raleigh. As to the condition of the water glass at that time, it was shut off, it was broke. It was shut off by the two valves. I ran the engine back to Raleigh with the gauge cocks. I will explain that. By turning the gauge cocks, water would run out if it was there, but if the 102 water was not there, steam would come out. Condition of the gauge cocks, they were open. They were in good condition. Those gauge cocks were put on the engine to gauge the water in the boiler. You can gauge the water in a boiler with the gauge cocks and without a water glass. That is what I did in running from Apex to Raleigh.

Cross-examination.

Examination conducted by Mr. Simms:

I came back on the train from Apex with him. Mr. Horton said he was suffering a great deal of pain. Seemed to be suffering terribly. I ran the engine back to Raleigh. When the water gets above the third water gauge, you can not tell how much it is above. I usually shut it off then. With the water glass working, it would be out of sight in the water glass. The gauge cocks is the only correct way to find out the height of the water. Yes, it is a double check. I ran with Mr. Horton on the first trip after the glass was broken, then went with him on the next trip. It is a fact that this little water tube or water glass was sitting up there on my side of the engine, and it did not have this protective shield when we passed the Standard Oil Company plant that morning when we went out, and we went on down to Aberdeen and came back the same way, and went out on the next trip the same way, and this was the third trip when he got hurt. It was on your side of the engine, right in front of my sight. I never said a word to Mr. Horton about it on the trips. I spent the night with him at Aberdeen. I was with him all day on the trip and with him at night. I had been at that time firing nearly four years, about three years and a half. Yes, it was my fault that it got broke. I took it out to clean it when it was hot. The engine was then in operation. Horton was attending to his side of the engine, and looking back to see about the coupling up on his side of the cab. It was coupling up.

103 POWHATAN M. MATTHEWS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I am an employee of the Seaboard, working as machinist. In August, 1910, I was acting as round house foreman and lived here in Raleigh. Have lived here practically all of my life. Have lived out of the city 7 or 8 years of my life since I have been a man. Have made the machinist trade my calling. I have no recollection of Mr. Horton reporting to me on August 4, 1910, in any way, the absence of a guard glass in the Buckner water gauge or on July 28, or at any time reporting to me that the glass in the Buckner gauge on engine 752 was missing. I have no recollection of his ever saying anything to me about it. I do not remember any conversation with him about the water glass on his engine. I do not remember any conversation in which I told Mr. Horton that the guard glasses were kept in Portsmouth and that I would send and get one. Defects on engines are attended to by work reports written out by the engineers. Verbal reports are not regarded. It specifies that on the form furnished. That is a provision of the rules. I will explain that. We are not held responsible for it. The man in charge is held responsible for what is absolutely written down on that report, as he has to o. k. it. That

is the character of the work report made by the engineers at that time. It has been changed since. They put on that work report all defects of the engine that they wished attended to. That would include the absence of the guard glass in the Buckner gauge; that is a part of the equipment; it is a part of the equipment, not a supply. The work reports after they are made out by the engineers are deposited in a box furnished for that purpose, then the clerk in

104 the round house takes those reports and copies them off and distributes them to each craft of trade, for instance, boiler work, pipe work and machinist work, and so on down. There are spaces provided for each one, and each one goes to the pigeon hole provided for that and is so marked, and the machinist, boiler maker, etc., each attends to his part on the engine. The round house foreman looks after the repairs reported to be done on an engine.

Q. If the absence of this guard glass had been noted on the work report by Engineer Horton, what would have been done?

Objection by Mr. Simms for the plaintiff.

Q. What would have been your duty in respect to it?

A. The machinist who got that would have got that on his slip. His duty would have been to get a requisition and supplied it.

Q. How would that have been supplied if there was no guard glass in stock?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 20.

Q. What could have been done?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 21.

Q. What would have been the duty of the machinist who had this work report had the absence of the guard glass been noted on there and there were none of the Buckner glasses in stock?

Objection by Mr. Douglass for plaintiff. Objection overruled. Exception:

105 A. He would have reported the matter to the foreman in charge, and they would have made some provision for it or cut the water glass out.

Objection by plaintiff. Objection overruled. Exception.

It would have been cut out by shutting the bottom and top cock off. The engine then would have been operated by the gauge cocks. Yes, you can operate an engine by the gauge cocks. The purpose of the gauge cocks on an engine is to determine the height of the water in the boiler.

You can operate an engine with safety with the gauge cocks. You can do that with the gauge cocks and with the water glass cut out. At one time engines had nothing but gauge cocks on them.

I do not know how long it has been since engines were equipped

with water glasses, but I have equipped engines in my time that did not have any water glass on them. And the gauge cocks were the sole method of determining the height of the water. There was glass in the store room at Johnson Street out of which a guard glass could have been made for the Buckner water gauge. It could have been cut and I have done it. It was a heavy plate glass that was used for the power headlights. Glass in the headlights broke so frequently they used heavy strips.

(Hands witness a piece of glass.) Can you tell whether that is some of that same glass? That is about the thickness.

Two pieces of glass of that character answer the purpose of the guard glass?

What would I have done if the absence of this guard glass had been called to my personal attention by Mr. Horton? I would have endeavored to have made some provision to supply a glass of some kind to have made the water glass operative.

I am familiar with the duties of engineer with regard to inspecting his engine. He inspects his whole engine, his entire engine, and makes his report up, with the exception of underneath, as there is no pit provided. Yes, he inspects in the cab. If there is any defect in the cab he reports it. The duties of an inspector are to inspect the engine when it comes in the round house, all over her, underneath and everywhere, but most of his work is below the running board.

Q. Are the water gauge and water cocks part of the engine that should be inspected by the engineer?

A. Yes.

Objection by plaintiff, and same is excluded by the Court as it has already been answered. Defendant excepts.

Exception No. 22.

The absence of the guard glass is a defect that should be put on the work report by an engineer.

Cross-examination.

Examination conducted by Mr. Douglass:

I was asked the question as to whether Mr. Horton reported the absence of that glass and said I did not remember, and I do not. That is as far as I go and is as far as I know. I do not remember. I do not deny it. I can not remember it. I do deny positively that I told him I would send to Portsmouth and get one. I do not remember his coming to me. If there was one there I would have gotten it, but if there wasn't one there the standard Buckner shield would have had to come from Portsmouth if there wasn't any in stock. I do know that they have been in stock. I have gotten them out of the store room and put them on engines. I can not say when. I would only get one at the time to equip an engine. Can not say how many times. As many as twice. I go to the store room and the man gets it off the shelf and gives it to me. This

Buckner Water Gauge is a patent. I have put another kind, another sort of glass in that patented gauge. I have done that. Men have come to me personally and I have cut them. I paid attention to that personal request because it is a part of the equipment.

107 I did pay attention to personal requests. So if Mr. Horton had come to me personally, I would have certainly attended to that water glass. I have known engineers to run engines without the water glass. They had a shield but not as good a one as that. I do not know what they do on the road, whether they have run them in the last 6 years without a shield. I could not say that I know that all engineers run the engines without shields. As to the custom and practice when I went with the Seaboard to run engines without any guards around the glass at all, will say the shields I can remember were made out of pipe, and they flew to pieces. They did not prevent the glass from flying about. It was iron pipe and it flew out through the slot. (Witness is handed an object.) That is one of them. Nothing to keep the glass from coming out. As to knowing of an engineer shutting off one of these and running on his gauge cocks, I do not know what they did on the road. I have seen them run with this kind. I do not know that I have seen larger holes than that. That is as big a hole as I have seen. I guess that is big enough to cut a man's head off if it hits it. I have seen them run stationary boilers with three little brass rods but not a locomotive engine. I have seen one of these tubes to run more than 12 months without breaking or cracking, and then again they won't run at all. Lamp chimneys—same principal. I do not recall in my former testimony stating that I had a conversation with Horton at the clinker pit, but I could not state what it was. I do not remember saying that. It might have been so. I won't deny it, not when it happened 2 or 3 years ago. I did not charge my mind with any of it particularly, I had about as much on my mind as I could carry, that is why they try to obviate so much verbal work, but when a man comes and tells me anything, for the sake of my job and for the sake of the work, I try to do something for the man. As to the character of the water we were running along at that time at Johnson Street, in dry spells the water

108 was all right, but in rainy weather it was muddy. We got the water from the branch. The surface water from Johnson Street, it was the branch down there. When it rained it was muddy. It was more or less full of sediment all of the time. It was not city water. It was branch water.

Redirect examination.

Conducted by Mr. Allen:

With reference to keeping the gauge cocks open, if one of them is reported stopped up, we take the stem and packing nut off of it and run a wire through to see if it is open, and when it is, it is put back and then it is repacked. It was the machinist's duty then to see that the gauge cocks were open and in working order, but there is a special man on it on account of the government inspection of boilers.

When the engineer and the fireman take out the engine it is the duty of the engineer to see that the equipment is on there. When a man takes an engine and finds that the gauge cocks are closed he should report that they are stopped up.

There is very little difference in the opening to the water glass and the gauge cock. I would say that one is as apt to stop as the other. You can tell the opening from the one you have up here.

Q. Did you ever tell Mr. Horton to run his engine like she was and you would send to Portsmouth and get a guard glass for the Buckner gauge?

Objection by plaintiff. Objection overruled. Exception.

A. I don't remember telling him that.

Q. Would you not know whether you told him that or not?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 23.

I could as foreman wire to Portsmouth for a guard glass.

By the Court: He has already answered that.

109 If we wire here today, a train leaves Portsmouth coming this way about 9:45 or 9:00 o'clock, something like that, coming to Raleigh, gets in here about 4:05, and it would be here for the day's work.

Wire one evening and it would be here the next morning. If you would write for it, if the letters leave here at 11:40 or 11:45, it is 7 hours' run from here to Portsmouth, passenger run, the guard glass could be gotten back in Raleigh, easily you might say, in twenty-four hours from the time you wrote the letter.

Recross-examination.

Examination conducted by Mr. Douglass:

In case they did not have any, they would wire back that they did not have any. I did not know whether they had any at that time or not. They have a water glass in there with the gauge cocks because it is a lot of convenience, a man can tell at a glance about the water. If a man is out on the road and the water glass and gauge cocks both get stopped up, I would knock the fire out of her. I would knock the fire out of her right now, standing on the main line, and wire the office what I had done. Gauge cocks have stopped at times, yes, and water glass, too. If that would happen to me, I have sworn that I would knock the fire out of her and stop right on the main line. I would go as far as I could. It is very important to know as near as possible where your water is.

D. K. WRIGHT, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I am an engineer on the Seaboard, live in Raleigh, and
110 have lived here 20 years, and have been an engineer 30 years.

Have been with the Seaboard as an engineer 20 y-ars. I have been an alderman of the City of Raleigh, if you call that an official position. In the Brotherhood of Locomotive Engineers I occupy the position of legislative chairman for the State. I am familiar with the equipment of engines on the S. A. L. Railway as to gauge cocks and water glasses. Am familiar with the construction of engines of the class of 752. They are equipped with gauge cocks and water glass. Gauge cocks are valves to determine the level of the water in the boiler. Water glass is for the same purpose. Yes, you can operate an engine with the gauge cocks and with the water glass cut out. You can do that with safety.

Q. Did you ever operate an engine that had no gauge glass on it?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 24.

Q. Did you ever run an engine when there were only gauge cocks and no water gauge on it?

Objection by plaintiff. Objection overruled. Exception.

A. Yes.

Gauge cocks have been in use on the Seaboard about 12 or 14 years. Prior to that time they did not use any. Gauge cocks were used for the purpose of determining the amount of water in the boiler.

Q. If anything should happen to the gauge glass, what is the duty of the engineer?

Objection by plaintiff. Sustained. Defendant excepts. Exception No. 25.

Q. What would be the duty under the rules of the company?

Objection by Mr. Douglass for plaintiff.

111 There is no specific rule covering that. No, it would not be covered by the general rules, it would be covered by a man's judgment.

If an engineer should find that his gauge glass that his water gauge was defective in that the guard glass was gone, and he discovered that on the line of road, in my opinion, it would be his duty to cut it out and use the gauge cocks.

(It is held by the Court that Mr. Wright is an expert locomotive engineer.)

I do not consider it safe to use the Buckner water gauge without

a guard glass. The guard glass is to protect the engineer in case the water glass explodes. If the guard glass is absent I would close the valves to the water glass. That is, I would shut off the water glass.

If an engineer discovers that the guard glass is gone from his water gauge, when he gets to the terminal he should report the defect.

He should report it on the regular form for that purpose, in writing. It is the duty of the engineer when he first gets on his engine to take it out on his run; to inspect his engine and see if it is in condition to make the trip successfully, to see if it has been supplied with fuel and water, and to see that it is properly equipped and safe to make the trip and has the necessary supplies and tools and water. His duty with respect to the gauge cocks, he is supposed to know that they are in good working condition. His duty as to the water gauge is the same thing, to know it is in good condition. The water glass is part of the equipment of an engine, not a supply. I consider the guard glass a part of the equipment of an engine, not a supply. I say that the water glass is not complete without this. (Witness holds up a piece of glass.) This is a part of the equipment.

Cross-examination.

Examination conducted by Mr. Simms:

112 Yes, the Buckner glass, the water glass, is a part of the equipment, according to my understanding. No, the removable shield, like that, would not be a supply for that piece of equipment, it is a part of the equipment. No, it is not a supply for it, it is part of the equipment. I put that on the ground that the engine would not be complete without it. As to the glass, neither is the headlight. I suppose the headlights are kept in the store room. That is supposition on my part. I do not know whether the Buckner glasses were treated in the store room as supplies or equipment. The purpose of these gauges and glass is to determine the height of the water in the boiler. The question of the height of the water in the boiler determines the safety of the operation of the engine. It is essential that the engineer know the height of the water. No, the water gauge is not put on there for the purpose of more accurately determining what the height of the water is. No, I did not testify to that before. No, that is not my answer, that the water glass attachment is more accurate than the gauge cocks. It is more convenient. It is put on there to enable the engineer to more conveniently and expeditiously execute his duties. I have run engines with the water tube or water glass exposed. I did not have the water glass shut off when I was doing that. I was using it exposed like, but not on the Seaboard. Yes, it was on a locomotive engine. Never had run them that way on the Seaboard.

Redirect examination.

Examination conducted by Judge Biggs:

(Witness is handed a paper, with the statement by counsel that it is the printed evidence of the last trial, which statement is objected to by counsel for the plaintiff. Witness is permitted to read the statement, but is cautioned by the Court not to read same aloud.)

I have read it. Now that I have read it, I say that the water glass was not as reliable as the gauge cocks.

113 DAVE CAMPBELL, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I live in Raleigh, have lived in Raleigh over a year now, am a locomotive engineer, in the employment of the Seaboard. Have been an engineer close on 10 years now. Am familiar with the duties of an engineer. Have been operating an engine continuously now for the last 9 years. Served a period as an apprentice before becoming an engineer.

(Court holds that witness is an expert.)

Am familiar with the duties of engineers on the Seaboard. It is the duty of an engineer when he gets on his engine to take it out on his run is to see that his engine is properly equipped and that everything is safe for the trip. If it is not properly equipped, it is his duty to see that it is properly equipped before he leaves.

When an engineer returns from his run, coming into a place where there is a round house with machine shops, it is his duty to inspect the engine and report all defects thereon.

He reports those defects on a work form furnished by the company. That is done in writing.

The rules of the company in regard to having these work reports in writing are that all defects must be in writing.

Verbal reports are not noticed. They are disregarded.

The character or kind of inspection that the engineer is required to make is to inspect all defects that he can locate. Yes, that includes the cab and equipment in the cab. That would include the gauge cocks and the water gauge, all devices in the cab. I am familiar with engines of the class of 752 on the Seaboard. Am familiar with the equipment of those engines.

The character of the equipment on that class of engine with respect to the gauge cocks and water glasses was Buckner gauges and gauge cocks.

114 If the engineer should discover that the guard glass on his water gauge is missing, it would be his duty to make report of it.

If he should discover that on the line of road it would be his duty to close both of the valves to the water glass and use the gauge cocks.

Yes, he could do that with safety, absolutely. It is very dangerous to use the Buckner water gauge without the guard glass.

Why is that? Because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube in the Buckner water gauge is liable to explode.

Cross-examination.

Examination conducted by Mr. Douglass:

I could not tell you how many have exploded with me. I do not know. I have not had one to explode with me in the last year to my knowledge. They are liable to explode. There is no indication how often. I don't take no chance, I have them renewed. Yes, the boiler is liable to explode. I take a chance on that. The boiler is liable to explode. What do you mean when you ask if those particular glasses are liable to explode? No, the lubricator glasses, they won't explode, the ones we use now. The ones we used to have used to explode. We would shut off the oil feed and use the auxiliary feed. I have shut off the water gauge and run on the gauge cocks many a time. Whenever I saw any likelihood of danger I did not take any chance. If I saw any leaking. In case it does not leak, I do not shut it off. If it goes to leaking, I shut it off as that is evidence it is going to pop. I would have to make a written report before I would get a new water glass. If the water glass failed just as I was leaving town, I would shut it off and go on. If I was not quite ready to go, I would go to the shop and make a report. I would make a demand on the foreman. If he told me that he did not have one, he would not tell me to shut it
 115 off and go on. Suppose he did? I would shut it off and go on. Yes, I have run with a naked water glass with gauge cocks and did not shut the water glass off, because I did not have anything else, and we were not using shields. Gauge cocks are not better than water glasses, they are too inconvenient. Yes, I take the risk for a little inconvenience. The reason why I do not take the risk now is because I am a little wiser. Hearing about Mr. Horton getting his eye hurt and a good many men before that. It is on account of Horton getting hurt, and others before him, is why I changed. Horton was a good engineer. It depends on which way they are sitting which way it throws the glass. This is the way the glass sits. (Illustrates.) I have had a tube in the Buckner gauge to break with me. No, never had one explode or blow out, not with the glass missing. My common sense would tell me how the glass would go. I am not supposing, my common sense would tell me. How do I know how the glass would go; if I step out of the window, I would not fall up. The Buckner glass will not blow out with the guard glass in, it will break.

W. S. BURRUS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I am an employee of the Seaboard Company, Chief Clerk to the Master Mechanic, live in Raleigh, have lived here since 1907. Lived here prior to that, about five years. In July and August, 1910, I was employed in the office of the Master Mechanic at Raleigh, at Johnson street. I recall the time that Mr. Horton was in my office and made a statement about the explosion of a water glass at Apex. I asked him questions at the time. They were reduced to writing.

The questions and answers were taken down by the stenographer and written out.

116 I witnessed his signature to that. He signed it in my office. (Witness is handed a paper.) They are the answers — gave to the questions.

Paper offered in evidence by defendant.

At the time Mr. Horton made that statement he also made a statement to me about what he meant by overlooking to report the engine not having a guard glass, where he says for reasons best known to himself. I do not know as I remember the exact words, but he said something about having been up for having been reported for chicken fighting and drinking, etc., and his mind was in such state he would probably have overlooked a train on the main line. Something like that, or words to that effect.

Q. If an engineer is employed or discharged by the Seaboard, what officer has control of it?

Objection by plaintiff. Objection sustained. Exception by defendant. Exception No. 26.

Exception No. 26.

Q. Would the notice of the dismissal of an engineer come through your office?

Objection by plaintiff. Objection sustained. Exception by defendant. Exception No. 27.

Exception No. 27.

Q. Had Mr. Horton's employment as an engineer ceased?

Objection by plaintiff. Objection sustained. Exception by defendant. Exception No. 28.

Exception No. 28.

Q. When did Mr. Horton's employment as an engineer cease?

117 Objection by Mr. Douglass for plaintiff. Objection overruled. Exception by plaintiff.

A. I do not know as I exactly understand your question.

Q. When did he cease to be an engineer in the employ of the Seaboard, when did you ask for the return of his passes, etc.?

By the Court:

Q. Do you know whether he has ever been discharged?

A. He was never notified.

Q. Do you know whether he has been discharged or not, of your own personal knowledge?

A. No.

By Mr. Allen:

Q. When did you request Mr. Horton to return his pass and the other property of the Seaboard Air Line Railway, if you did?

Objection by plaintiff. Objection sustained. Exception by defendant. Exception No. 29.

Exception No. 29.

(By the Court:) You want to show a certain date?

(By Mr. Allen:) The defendant proposes to prove by this witness that he did not take up the plaintiff's annual pass issued to him as engineer, and the other property belonging to the railroad company, until after suit was brought by the plaintiff against the S. A. L. Ry.

Q. When an engineer ceases to be connected with the Seaboard Air Line Railway, is he required to turn over his pass and the other property of the railroad to the railroad?

Objection by plaintiff. Objection sustained. Exception by defendant. Exception No. 30.

Exception No. 30.

118 Cross-examination.

Examination conducted by Mr. Simms:

The engineers are instructed to make out these reports on their engines as soon as they arrive. The rules require that they inspect their engines and make out their reports as soon as they get into Raleigh, before they knock off and go home. On that local freight they laid over one night in Aberdeen and the next night in Raleigh.

If Horton was on that run and left Raleigh early in the morning and reached Aberdeen late in the evening, and returning left Aberdeen early in the morning and arrived here late in the evening, he would not have much time to fight any chickens.

He could not fight chickens, but he could drink liquor on the road.

I have not made any statement that Mr. Horton drank liquor or fought chickens. I only told what Mr. Horton told me about being reported for fighting chickens. The reason why I made that (indicating written statement of accident to J. T. Horton) is that the rules of the company require that all injuries be reported to the company. I had him there for the purpose of making a statement of the injury to the company. No, there is not a thing about the chicken fighting and the drinking in there. He would not have signed the statement if I had put it in there. He made that further statement to me that I did not put down. It is not in that statement. I took that state-

ment there and omitted the other. He was called back to the office by the master mechanic and he made another statement. I do not know whether this statement was made five days after the accident or not. The stenographer dated it. That is all of the statement he made before the stenographer. Answering the question, Don't you draw your pay from the company for faithfully doing your duty, yet you did not do your duty as you left out that information, I
 119 answer I did not voluntarily ask him about that. He just told me. I don't know how to answer your question, You did not think it had anything to do with it. I did not give that any serious consideration, I did not pay much attention to it. He had a little black shade over his eye at that time. A shield over his eye. I do not know how long it stayed there. That is the statement he made out.

EDGAR W. BARBEE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

My name is Edgar W. Barbee; am a son of Edgar B. Barbee, who was in the cotton business here. Have lived in Raleigh practically all of my life. Am employed by Seaboard as engineer. Been an engineer about 9 years. Am now employed by Seaboard as engineer. Am running extra out of Raleigh. I ran engine 752 in the summer of 1910. It was equipped with a Buckner gauge at that time. It had a guard glass. It has been about 9 years since I was promoted from fireman to engineer. Was examined for promotion as to my sight and hearing, by Dr. Battle. Mr. Horton was with me at the time. We were examined in Dr. Battle and Lewis' office, at that time on Wilmington Street. I was present when Mr. Horton was examined. I heard what Dr. Battle told Mr. Horton at that time about the condition of his sight.

He told Mr. Horton that his sight was defective, his right eye.

Yes, Dr. Battle said something else to Mr. Horton at that time. He told Mr. Horton that he would let him go to work, that he was not the Seaboard oculist, and he would have to come back to see Dr. Lewis.

That was 9 years ago. That is the only time I have ever been
 120 to Dr. Battle's office with Mr. Horton, and the only time I have ever been examined by Dr. Battle as to my sight.

Cross-examination.

Examination conducted by Mr. Clyde Douglass:

Mr. Horton continued to run as locomotive engineer for the Seaboard after that. As to whether the rules at that time required that engineers' sight be good, I think that was the purpose of the examination, to determine whether his eye-sight was good. The doctor told him to go to work just as I stated. He continued in the employment of the Seaboard, a part of the time on some of the most important

trains they had. I have been a Seaboard engineer about 9 years. I was in the employ of the Seaboard at the time Mr. Horton was injured. I am familiar with the Buckner water glass. Am familiar with the guard. Yes, it is true that engineers on the Seaboard ran their engines out with the water glass, without cutting it off, with the guard glass missing, prior to the time Mr. Horton was injured. As to whether guard glasses are supplies, supplies to be kept in the store room, I think everything of that kind is kept in the store room. Answering your question, if it is not a fact that a guard glass is a supply for a locomotive engine, I say well, yes, as being a part of the equipment of an engine. There was nothing to do but go in your store room with your requisition and get it. It was a very simple job. All you have to do is to pick up a piece of glass and drop it in a slot. It amounts to the same thing as obtaining a headlight glass, a flag or oil can, or any other tool or supply you want from the store room, I do not see any difference whatever so far as getting it from the store room. As to the duty of an engineer in respect to obtaining a guard glass or flag or torpedoes, fuses, or anything of that nature, or oil cans, from the store room, I would tell the fireman I did not have it. It was customary to send the fireman for it, the requisition would come from the foreman. The foreman would send the article to me. I would put it in myself, you would drop it in just like you put a quarter in a slot machine. After that examination by Dr. Battle, I do not know when Mr. Horton went out on the road with an engine or in charge of a train. He went out ahead of me. He stood ahead of me on the seniority list. I was running a switch engine.

Redirect examination.

Examination conducted by Mr. Allen:

It is the duty of an engineer when he comes in off his run to make a report of the condition of his engine. He reports all defects in his engine, the work report requires that. In the case the guard glass of his water gauge is missing, he would put that on his work report. It would be his duty to put it on his work report. That report is in writing, and it is his duty to put it on his work report.

Recross-examination.

Examination conducted by Mr. Clyde Douglass:

As to whether or not he could report it verbally to the foreman, general foreman or the master mechanic and go to the store room and get it, I understand the matter in two different directions, coming in and going out. He could get it that way if he goes to the engine and finds it missing after he reported it. No, if the general foreman was standing right there when he came in, it would not have been his duty to have gone to the foreman and got his requisition and put it in; afterwards when he was going out, if the work had not been done, he should have reported it, though, in the first place on the work

report. Yes, they do pay attention to verbal requests. Yes,
122 you can, that way, send your fireman and get a guard glass
if they have them in stock. We have 30 minutes and it takes
30 minutes to oil and inspect the engine, and I would tell the fireman,
if I saw something missing on that engine to go and get it, if I did
not see the foreman around to tell him myself.

LEWIS ARCHER, a witness for the defendant, having been duly
sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I live down at Macon, Ga., at this time, and have been living
there between 18 and 19 months. Prior to that time I lived in
Raleigh, employed by the Seaboard. Am now employed by the
Central of Georgia. Have been in the railroad business since 1882,
when I was 14 years old, in the mechanical department all of that
time.

It is held by the Court that the witness is an expert on water
gauges and gauge cocks.

Am familiar with the operation of locomotive engines. Am fa-
miliar with the construction and operation of the Buckner water
glass. It is a safe water glass with the guard glass in place. With
the guard glass out of place, it is one of the most dangerous things
you could have on an engine, on account of that slot, when the glass
breaks it throws the glass out of that one place. You can operate
an engine, a locomotive, without a water gauge, with safety, by using
the gauge cocks. I consider that the safest plan of operating. You
tell the amount of water in your boiler by the gauge cocks, by turn-
ing the gauge cocks. The gauge cocks are placed on the boiler ahead,
so close to the engineer he can reach them with either hand. He can
reach them from his side, and by turning can determine how much
water is in the boiler. By turning the gauge cocks, if you find that
the water is low in the boiler there is means at hand to put
123 more water in the boiler by means of the injectors. I was
general foreman here in Raleigh in 1910. Occupied that
position in August, 1910.

There was material down there at that time out of which guard
glasses could have been cut for the Buckner water gauge.

That (indicating a piece of glass) is the glass, that is about the
same thing.

I saw a guard glass for the Buckner water gauge on engine 752
cut out of glass of this character the afternoon the engine came in.

That was the afternoon that the water glass exploded with Mr.
Horton, and I saw this glass cut and put in the Buckner gauge.
That was ample protection. As to the effect of the use of this glass as
a guard glass if the inner tube exploded, it would act as a protection
to whoever was in the way or in the cab, the same way as the regular
glass would. I am familiar with the duties of the engineers with

regard to inspection of their engines. As to his duty, he is supposed to inspect the engine all over, except underneath. They do not require them to inspect an engine underneath now. Yes, he inspects in the cab. The gauge glass and the gauge cocks would be a part of that inspection. If they are reported, it is the machinist's duty to see that the gauge cocks are in working order, but if they are not reported, they are not looked at. If they are not in proper condition, it is the engineer's duty to report them on his work report, in writing. If the gauge cocks are leaking, he says on his work report, the gauge cocks are leaking, and if the gauge cocks are stopped up, he says on his work report, the gauge cocks are stopped up. I say as to whether or not the water gauge and guard glass are a part of the equipment of an engine, that it is just as much equipment as the driving wheels or anything else, the guard glass is and it is supposed to be in the written report as any other defect. Its absence is
 124 a defect. And the absence of a guard glass is required to be in writing on the work report.

Cross-examination.

Examination conducted by Mr. Douglass:

I was a witness here before. I did not get in a drunken condition and did not assault you here on the street for examining me. I did not threaten to assault you. No, I did not threaten to knock your head off for asking me about stealing water down there. No, I did not steal the water. No, Horton did not catch me stealing city water. We were getting the water through the meter. No, I did not know it was city water. I did not take the driving wheel off the meter so it would not register. Don't know who did. Did not [know] it was done. Did not O. K. any bills for the water, the chief clerk did that.

Mr. Pou approached me about this question. I told him that we had no water in the tank. The boiler had played out at the pump house, and I had to have water, and I threw the hose up in there and got the water. I did that one time, one tank of water. I don't know anything about the Seaboard paying \$2,000 for that tank of water. Answering the question, You have given your experience of what engineers could do, did you ever run an engine a foot? I will say Yes, after I got out of my time and while I was serving my time they required us to run an engine. I have run an engine on the W. & T. road. I was Master Mechanic. I did it a good deal. As to whether I am a trained engineer, I served my time. I fired three months. As to serving my time and running as an engineer, I never was rated as an engineer as I never applied for that job. Have run several engines on the Seaboard, when I was out with the men I have run for them. I ran 38 one morning from Sanford to the A. & M. College. No, that is not the first or
 125 only time I ever run an engine. I said when the glass broke and there was no guard glass in there, it would throw the glass out. I never saw that. I supposed that. It would hardly throw it backwards, it could do it. I never ran an engine at the

time they ran the open water glass without a guard. Never had seen a locomotive built with the three little brass things around it. Have seen them with the open guard glass like this, and without it too. They used a wire netting around the tube. No, never have been on an engine when one of those burst, and don't want to. When I first came to the Seaboard at Hamlet, they had some few like this. As to the water used when Mr. Horton was injured, it was muddy or not according to whether it was raining or not. They got it from the creek back of the shop. We got water there, it was a regular branch. Got the surface water when it rained. It was no more inclined to stop up the gauge cocks than any other. Yes, all of the water we get on the Seaboard is muddy, we get it from the creeks and branches. It was all muddy. That is what I think.

A. E. HOPKINS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I am an engineer on the Seaboard, Road Foreman of Engines at present. Was an engineer in 1910. Have been an engineer about 12 years. Have run engine 752 on the Seaboard. I ran that engine in here on the morning of July 26th before Mr. Horton took it out on July 27th. Brought it in the morning of the 28th. It had the guard glass in the Buckner water gauge. The guard glass was in place when I left it at the round house. The condition of the gauge cocks, all right. I knew Mr. Shott, the engineer who had the injury to his eye. I had a conversation with Mr. Horton, the plaintiff, at Mr. Shott's house, and we had a conversation between the house and the round house. This was before
126 1910, before the time of the explosion of the water glass on engine 752. The conversation, we talked quite a lot about the injury that Mr. Shott got from a water glass breaking at the house, and on the way from the house he told me that he only had two or three-fifths sight in one eye. He said he was running on the Seaboard, but he did not expect he would be able to get another job on another railroad.

Cross-examination.

Examination conducted by Mr. Simms:

When that conversation occurred, we were just going by the old brick office on Halifax street. It was on the way from Mr. Shott's house down to the Seaboard, down to the round house at Johnson street. Mr. Shott lived down on Polk street, somewhere about in the first block off Wilmington, the first block east of Wilmington. You can go through from Polk street down Johnson street to Johnson street depot, or you can go from Polk street down Wilmington and by the brick office. That would not be going out of your way a quarter of a mile, not that much. Where Johnson street heads into Polk street on Wilmington street, it misses Polk

street about half a block. You can go out of Polk by Wilmington into Johnson and head right straight at Johnson street station. The round house is north of that. Instead of that we headed south from Polk street on Wilmington street half a block to North street, then went west two blocks by the freight depot right down North street. We went west and south and then west and then north. I did not tell Mr. Horton that I was hurt before he came out and told me that he had only two-fifths of sight in one eye. He said two or three, he did not act like he knew himself. No, I did not think it was sort of fool talk. No, I did not think a fellow talking like that would talk himself out of a job. I told a couple of friends about it. I don't know how soon, some little time afterwards. I

127 I did not know anything was the matter with Mr. Horton's eyes. Did not know anything about it. He came out with the statement that he had only 3 or 3-5 sight in one eye and I went off and told it, yes. We talked about Mr. Shott's injury from a water glass. He and I were alone. Mr. P. B. Bishop was not there. I know Mr. Bishop. D. S. Craddock was not there. He was not at Mr. Shott's. A. R. Vaughan was not at Schott's. E. C. Horton was at Shott's. He was not at the brick house when we had that talk. I have told you where I went. Then I went home. I don't remember what I was doing down there, I suppose to see how I stood out. I do not remember particularly anything else Mr. Horton said. Don't know where he went. Don't remember anything I said to anybody up at the round house. Don't remember anything I said to anybody. It was when Mr. Shott got hurt. Not ten years ago, I have not been here that long. It was when Mr. Shott got his eyes hurt. I don't know how long ago that was. I came here in 1906 and started to work on the fourth of May. Came from Canada. I do not remember the exact time of that conversation. I did not run over a man out here and kill him.

At 6.15 P. M. the Court takes a recess until 9.30 A. M., Friday morning, September 25, 1914.

J. B. PENDLETON, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Judge Biggs:

I live at Portsmouth, and at present I am what is known as a trial engineer. Have been an engineer 32 years. Seaboard is the only place I ever worked.

(It is held by the Court that the witness is an expert locomotive engineer.)

When an engineer gets on his engine preparatory to making a run he should make a general inspection of everything around there and see it is in good shape.

128 If he found before he started that the guard to the water glass was absent he would make a note of it and report it to the proper authorities before he left there.

If he did not have time to report it before he left, he had already started out, he should close it up and not use it.

It would be his duty as an engineer when he got back to report it on his work report in writing, on the form provided for that purpose. The guard glass on the water gauge is a part of the equipment of an engine and is not what is known as a supply.

The absence of the guard glass is such a subject as is required to be reported on the work reports.

Yes, it is safe for an engineer to operate an engine equipped with a water glass that has no guard glass; to be safe in operating it in this way he should shut off the water gauge and use the gauge cocks. I don't think I misunderstood your question, as I stated it is not safe to use the water glass without a guard glass.

The foreman or the general foreman when I reported to him that there was no guard glass, or an engineer reported to him that the guard glass was absent, and he told me to run it without the guard glass, the proper way to run it would be to shut it off and go on with the gauge cocks.

I suppose I ran an engine 12 or 15 years without a water glass. As to the method on those engines for testing the water, we did not have anything but the gauge cocks. That was the only way the engines were equipped.

Q. Now what is the duty of an engineer when he gets on an engine preparatory to making a run with reference to the examination of the gauge cocks?

— It is to examine them.

By the Court: It is his duty to examine everything in the cab to see that they are in proper place.

These inner tubes in the water glass are liable to break. I know that from experience. They have broken with me. Well, I don't know just how to answer your question of "seldom or often." They break every once in a while. It is apt to go in a week or
129 two weeks, and I have known them to run six or eight months.

Cross-examination.

Examination conducted by Mr. Douglass:

No, I have not known them to run two years. I have never had one to run two years with me. Have had them to break. I did not say I never had one to break. I live in Portsmouth, and stay there. Have run an engine with an open guard glass without any shield at all. The reason I did not shut off the glass and run with the gauge cocks, we were running with low pressure, 150 pounds. I don't know whether engine 56 was equipped that way. I don't think I ever run that engine. Yes, engine 69 was equipped that way. I don't understand you. If you mean without the guard glass, I don't know about that. When do you mean, when she came from the Richmond Locomotive Works? I don't know about that. Have been operating engines recently, up to two years ago. First operated

an engine with the guard glass upon it possibly ten years ago, after they first commenced getting engines here with high pressure boilers. Yes, they used these guard glasses before 5 or 6 years ago. You saw one exhibited here with an open slot in it. It is very simple. That is very small. About one-sixteenth. Never saw one over one-sixteenth not unless it was put on by someone else than by the railroad. I was not there when they were all put on. I was there when they were equipping. I have seen engine 738. As to whether that was operated on engine 738, will say that was not put on by the direction of the railroad. I know that because the railroad company had four small slots in them. I don't know what the custom of the engineers was, but the railroad did not put that on. That one, that is the style glass we put on. Glass could come out of that. Run trains 38 and 41, have run them without a water glass. What do I do when the gauge cocks get stopped up? I don't let them get stopped up. Prevent it by blowing them out. How do I do it? When I run an engine regularly I can keep the cocks clear, but when some one else runs the engine I can not keep them clear. I am an employee of the railroad now.

W. T. SMITH, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

I live in Raleigh and have lived here since about '87, with the exception of a few years. Am at present employed as office clerk in the Supreme Court Clerk's Office. Before that was a public stenographer. Have had experience off and on for 20 years. I made a stenographic report of the evidence at the trial of the case of Horton against the Seaboard Air Line at the April Term, 1911. I did when the case was first tried. I did not make a report of the second trial. I think that was done by Miss Morrell. (Hands witness a paper.) I have examined this and it is my copy of my notes taken in that trial. The evidence was taken down by me in shorthand as the witness delivered the evidence from the stand, afterwards written out by me on the typewriter.

Q. Witness is asked to read that question, the two questions and answers.

Objection by Mr. Douglass for the plaintiff. Objection overruled, the witness having sworn that this is a true and accurate copy of the testimony as delivered by Horton at that time. Exception by plaintiff.

I wrote this paper that I am looking at. I recognize my typewriter work. I will read: "Where did you run to the first time? To Aberdeen. On your return to Raleigh what did you do? I asked Mr. Matthews, the foreman, if he had any glass and he said no, that

131 they were out in at Portsmouth, and that he had none. He was the day foreman at Johnson street." As to whether that is all of the answer that was given to the question, I will say that is all of the answer I got down there, and I made a transcript of the evidence and gave a copy to each side, and no objection was made by either side.

Objection by Mr. Simms for plaintiff.

By the Court: I will exclude that. What do you say whether that is all of the answer given?

I can only say in a general way that is correct. Of course, I have no personal recollection as to that question and answer.

I took down in shorthand everything that was said by the witness. Yes, I transcribed everything that was taken down, to the best of my knowledge and belief.

Q. I will read those questions and answers on cross examination.

"When did you say anything to Mr. Matthews about the glass being out of place? After the first or second trips I ran the engine. Where did you have that conversation? At the clinker pit or coal chute. What did you say to him? I asked him if he had any Buckner shields and he said No, the glasses were put in at Portsmouth."

As to whether that is all of that answer, it is all of the answer I have here.

Cross-examination.

Examination conducted by Mr. Douglass:

No, I do not undertake to say that I got every exact word that the witness said, but I got it down as near as it was possible to take it down, I suppose. As near as possible for me to get it down, no. I do not think witness Horton talks rapidly nor indistinctly. I do not recall how rapidly he talked. As to whether he may have said several important words that I did not take, I have given you my answer. I meant I got down his answers. There may have been one or two words omitted, but his answer was down with nothing important left out, and "a" or "and" or "the" are often cut out in taking them down. No, I have not left out as much as one-fifth of what the witness testified to on cross-examination. There has never been any complaint to me about my taking down or transcribing.

Dr. K. P. BATTLE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

Am a practicing physician of the city of Raleigh, make a specialty of eye, ear, nose and throat. Have been practicing here in Raleigh since '86. Before beginning to practice I graduated from the Uni-

versity of Virginia, and then Bellevue Hospital Medical College, and then I took special courses in London and special courses afterwards two or three times in New York. Am associated with Dr. Lewis in the practice, and have been for the same length of time, since '86. Dr. Lewis examines the eyes of the engineers on the Seaboard, and did in 1905. When Dr. Lewis was not in the office and an engineer would come there for examination, I would examine his eyes. When I would make that examination, I would make out a report showing the result of it on blanks furnished by the company. I examined the eyes of Mr. J. T. Horton, the plaintiff in this action, some time in 1905, and made a report of that on the form that I had for the purpose, stating on that form the result of my examination of Mr. Horton. I put it down at the time. (Witness is handed a paper.) That is the report I made. That was made April 18, 1905. That is my handwriting, every bit of it, except the signature of W. R. Hudson. It was all written at that time. I sent that to the company.

Paper in question is offered in testimony by the defendant over the objection of the plaintiff. Marked Exhibit "G."

(By the Court:)

Q. Did you say, Doctor, that you put on that paper what
133 you found to be the condition of his eyes at that time?

A. Yes, sir.

Witness read paper to the jury.

A man whose sight is 20-70 in one eye and 20-20 in the other, and in seeing with both of his eyes, I would say the character of his vision from a practical standpoint is very good.

I would say his vision is very good, practically as good as if both eyes were normal.

The Court finds as a fact from the testimony heretofore given that this witness is an expert.

I would say that a man's vision, a man whose vision, his sight, was in that condition, was capable, so far as his vision is concerned, of operating a locomotive engine.

Cross-examination.

Examination conducted by Mr. Douglass:

You ask me if on my former examination I did not state if I were examining a man's eye and found only 20-70, I would not consider that a slight defect in the eye so far as the vision is concerned?

That applies to one eye.

I know you are just asking me if I did not swear that. That applies to one eye, certainly. You ask me if the question generally was not asked me, if I examined a man's eye and found only 20-70, whether I would consider that a slight defect, that I said I would not consider that a slight defect, I will answer that I do not remember

what I said. Certainly, I can remember what I said awhile ago. Yes, I said that as to one eye.

If that is so, why did I report only a slight defect, only a slight scar on the cornea on close inspection only, only a slight scar, and called it a slight interference with vision in the right eye, why did I say that was a slight interference with the vision in the right eye.

134 By the Court: You said in that report that this defect was only a slight interference with the vision of the right eye, and now you say, as he understands it, that you did not say so, and you say now that it is not a slight interference. How do you reconcile those two statements.

I will say this. It is not very slight. It is not very great. Simply, it is a slight scar and reduced the vision from 20-20 to 20-70.

If the man would shut up his left eye, as to whether it would have been a slight interference with the vision only, I will say it was not very slight and not very serious.

As to whether 20-70 is a slight interference with a man's vision, that is not very slight. You ask me whether I call it a slight interference, it is not very slight. Yes, I can leave out the very, it might be called slight. No, I would not call 20-70 a slight interference. I do not remember in my examination before if I could reconcile the figures 20-70 with my note at the bottom of slight interference. Yes, I can reconcile the figures with the statement at the bottom of the statement. I do not see any discrepancy. What is the point? How do I reconcile my statement that 20-70 is not a slight interference, when I say 20-70 at the top and a slight interference at the bottom? It is just a difference of rating, difference of judgment, decision as to how slight. I call it a slight interference in this note. Yes, that is all I have got to say about it. Let me see that paper. (Witness is handed his report.) As to whether that is all I have to say, I will say that when I speak of the slight interference, that is not so accurate as the scientific statement above, the 20-70, that is the amount of defect of sight, and then when you change to "slight," that is very vague, inaccurate. No, I do not think the 20-70 in there is blacker ink than the balance of that paper. I have not noticed it. Let me see. I do not remember before stating to the jury anything about the ink. The ink is darker in some places. No, I do not think

that is blacker ink than the figures under it. There is some
135 ink at the bottom as black as that. I think that is a shade blacker than the figures 20.70. No, I did not have but one

bottle of ink when I wrote that paper, but I had a blotter. I could have blotted one without blotting the other. I have no recollection except for the paper. I stated on my examination before that all I remembered was that there was a paper and I signed it, that is all I remember distinctly. I have an indistinct recollection about, not positive. This paper went out of my possession immediately and into the possession of the Seaboard Air Line Railway, I suppose. It has been out of my possession 9 or 10 years, but I have seen it since then, more than one time. I mean by the figures 20-70, visual power, I mean 20 feet from his eye he is able to see type that he ought to see

at 70 feet. I do not think of it in the way that he is not half as good as he was before or one-third. I do not mean at all if a man was standing out there 70 feet from him he could not see him until he got within 20 feet, or that he could not see him distinctly until he got within 20 feet. He ought to get in 20 feet to see as clearly what a normal man sees at 70 feet. Yards and feet would be the same thing, it would not necessarily be the same thing. He should see 70 feet distinctly when he would have to get up within 20 feet to see distinctly. At times I might and at times I would not call that a slight interference with a man's eye. As to the times I would and the times I would not, it is a matter of judgment at the time. It is not always the same. As to the regular rules I have about that, the rules I have I followed in the 20-70, that is my record. Answering your question whether I would consider that when a man had to go up within 20 feet to see an object distinctly that he ought to see at 70 feet, whether I call that a slight defect in his eye, I will say no, with that eye I would not consider that very slight. I would consider that about 20-70. As to how long Dr. Lewis and myself have been in the employ of the Seaboard in these examinations of the eye,

I will say that Dr. Lewis was in the employ of the Seaboard in that capacity some time before 1905, I don't know how long.

I am his partner. My reports in his absence were accepted, but I was not the oculist of the road. My firm was employed by the Seaboard and has been ever since, practically. I can not say I remember Mr. Horton being there with an injured eye in August, 1910. I remember his being there once or twice, but I don't know when. I don't think I remembered the date at the last trial. I do not remember whether I said or not that he was treated for a wounded eye in our office in 1910, and I very likely went in and assisted Dr. Lewis with the man's eye.

Redirect examination.

Examination conducted by Mr. Allen:

Normal in one eye and 20-70 in the other, a man with both eyes open, I would say as to defects in vision that his sight is very good.

He could see practically as far as anybody else and see practically as small an object, and see as good as anybody else.

As to it being slight or not slight, I would characterize it with both eyes open as being very slight. In making that notation on my report as to it being slight, that refers to the right eye. With the good eye open and the right eye open, I would say that the impairment of his sight was very slight, very little affected. As to what I was doing when I was examining Mr. Horton, I examined him for further work with the road. I could not say whether it was a question of promotion or not. I don't know.

I think I know the purpose of this examination. It was to ascertain whether his sight was good enough to stay with the road or not, as I understood it. Certainly, I regarded it as good enough. (Witness is handed his written report.) I put that 20-70 there. That expressed the result of my examination of Mr. J. T. Horton. That

137 is what I found the sight in that eye to be. As to what I mean by 20-70, how I examined him, I put the type in a good light in 20 feet from Mr. Horton, practically, 19 feet actually, and I found that he was able to see at that distance type of a size that he should have seen at 70. I mean by type, printed letters on cardboard. Those letters vary in size. Take the one at 70, estimating the size, how large, I can show them to you. About one and a half is my recollection. In making the 20-70, that refers to the letters I put up. Does not refer to other objects, just the letters. (Witness handed his written report.) There has been no change in that since I wrote it, no change in the figures 20-70.

Recross-examination.

Examination conducted by Mr. Simms:

I said that the 20-70 referred to letters only, I mean I did not test him except with letters. In a general way, the same impairment I found by testing him with letters would apply to other things, he would see 20-70. In every way.

Redirect examination.

Examination conducted by Mr. Allen:

I do not mean by that in looking at a man you would see only 20-70.

By the Court: He has said he does not mean 20-70 in percentage, as well as he did before, or anything like that. It is only the way of designating it.

Dr. R. H. LEWIS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Allen:

138 I practice medicine in the city of Raleigh, eye and ear, I never extend to the nose and throat, for the last several years the eye only. Length of practice, I graduated in 1871, was then in a general hospital, first year as assistant and second year as resident physician, and after that I took up the general practice for a while, and then I decided to take up the specialty, and have been practicing the specialty since April, 1875. Began to practice in Savannah, Ga., in 1875, and married in Raleigh and settled here in 1877, and have been practicing here ever since.

Court holds that the witness is an expert.

I am the examining physician of the Seaboard in Raleigh as to the eye. Have been for a great many years. Don't know how long. I have no memory for dates. I was in 1910, and was in 1905, and prior to that. In addition to making examinations of the eyes, as I understand my duties, all injuries to the eye caused by the railroad

are treated by the oculist. I think I examined J. T. Horton in 1910. I would not swear it was 1910 or 1911, the records will show the exact date. I examined him after he was hurt. Describing the condition of Mr. Horton, will say he came to my office and told me of the explosion of the water glass. I examined his eye, but looked first to see if there was any wound on the skin or face, and I found not a scratch. I say I found not a scratch, and then I examined his eye. His eye was free from every irritation except the lower part of the white of the eye was a little—well, as my eyes would have been had I been drinking the night before. The upper part of the eye was perfectly white, as white as mine, and then upon close examination I found that the cornea—in order that you may understand I will say this about the construction of the eye. The eye is built up in layers. There is the outer covering, which is a mucous membrane like lining of the eye, and under which is a membrane on which the cells are built up, extremely thin, so if you scratch either one you can easily wound them. Such superficial wounds as these we often

139 find in nursing mothers, where the child's finger nails have cut the eye. These easily and quickly heal without leaving any scar or having any effect except the slight inconvenience.

Well, below that is the true substance of the cornea, the real substance of the cornea, and that is the thickest part, and that constitutes the main body, and there is a very admirable arrangement of the fibres which are arranged in such a way as to let the light pass through, but if they are disturbed, the light is obstructed. It is not necessary to go into what is below. When I examined his eye, I found there was a horizontal scratch right across about the center, horizontally across this cornea right over the pupil or the center of the eye, frequently called the sight of the eye. I saw a very fine scratch, entirely superficial, which did not reach down into the true substance of the cornea at all. It was as if you had taken a pin and made a superficial scratch, hardly getting the blood. It was horizontal, from one corner to the other, and I was puzzled at the time to know——

Objection by plaintiff.

I was surprised to see the direction——

Objection by plaintiff.

I will describe the injury I saw. It was a very shallow and very narrow, almost hair line, and a horse's hair would have filled it, horizontal, not entirely, and I suppose about 3-13 of an inch in length across the center of the cornea, and then Mr. Horton asked the question, "Doctor, what effect will this have on my sight," and I said, "I cannot tell you now what effect it will have on your sight. As it seems to be so shallow it may not have any effect upon your sight, but if the cut has gone into the true substance of the cornea, and a scar results, your sight will be more or less impaired." I saw him every day then, and in 43 hours he was well, as far as the cut was concerned. It was filled up and smoothed over and brightly polished as in a normal eye, but he did not see as well as he ought to

see, and then I made another examination to see if I could find a cause and then I discovered this scar. I did not make an examination at first for the reason that his eye was just injured and
140 he complained at that time as to the sensitiveness of light, but after the wound healed up, and he did not see as well as he ought to have seen, then I examined him with an artificial light, in a bright light, and then I found running across the cornea a very fine scar, opaque, like you had breathed on the window, that will give you a better idea, but not as dense, but the scar was very much wider than the original cut and not exactly in the same direction. In the same general direction apparently, but not precisely the same, and I was at a loss to understand how in the world he could have had such a scar or any scar from this superficial cut which healed in 48 hours. At that time I did not know anything about a prior injury to Mr. Horton. I had never seen Mr. Horton before. In my opinion, the very slight cut I found could not have caused that scar. I do not think the slight cut I found there after healing up as I say in 48 hours had any effect upon the vision of Mr. Horton. I have seen so many cases of injury—

It filled up with new cells of epithelium. That was a perfect healing. Not the slightest sign left, it was all on the surface. This scar that I found, it was in the same general direction as the cut, both running across the center of the cornea. I do not remember exactly the angles, I remember the cut was horizontal. I would say that a man who has 20-70 in one eye and normal in the other eye, in using both eyes, with both eyes open, I would say that his sight is good. I have approved that for an engineer. Yes, I think a man in that condition, from my standpoint, is capable of running a locomotive engine. I am not familiar with the duties of an engineer, but I would say that it is sufficient to enable him to perform his duties so far as his sight is concerned. After examining Mr. Horton I do not remember any conversation we had as to whether he was fit to resume his duties. I have a mighty poor memory, but I was very much struck with this case.

If the jury should find from the evidence that on April 18, 1905, the plaintiff's eyes were examined by Dr. K. P. Battle,
141 and there was at that time a very old linear scar on the cornea of the right eye, and that the plaintiff's sight in that eye was found to be 20-70, and the cornea of the plaintiff's right eye was slightly scratched on August 4, 1910, and this wound healed in three or four days, and that in 1912 only one scar existed on his right eye, being a linear scar, and that the sight in that eye was then 20-70, I think that the injury to the vision was caused by the old scar.

Cross-examination.

Examination conducted by Mr. Douglass:

I remember very distinctly when Mr. Horton came to my office. In treating him for that eye, I think I treated him off and on for about a month, several weeks at any rate. I looked at it from time

to time. I gave him a light wash. I don't remember distinctly giving him any medicine after the first time I saw him. He complained not so much of pain as sensitiveness to light. Upon examining his eye he complained, but before a bright window he did not show the flinching as I would expect from his complaint. I gave him a prescription. I don't remember how late. I see so many people. I don't remember all of the details. I know I did give him a prescription on account of his complaint about his eye, but I did not see why he needed it. I don't remember whether as late as October 18th I gave him a prescription for cocaine, boric acid and water. It is a prescription commonly given by oculists. The cocaine in the prescription varies from $\frac{1}{4}$ to $\frac{1}{2}$. Yes, there are two grains in that one. That is stronger than I usually employ. Do not usually use more than half a grain unless there is a great deal of pain, or going to be an operation. The date of that is October 18, 1910. I gave him then two grains of cocaine, vaseline, in the form of an ointment. The date is not on that prescription. It was before that one, you can tell by the number of the prescription, 101 thousand and 104 thousand, this is the first one. I don't think my recollection about this man and my recollection from these prescriptions has changed materially. I said that he went to the window and did not flinch from the light. I would say that evidently the man was complaining from pain in his eyes, considerably, as late as October, 1910. He complained very much of sensitiveness to light, but I did not find in my examination the evidences of sensitiveness of light that he complained of. I don't remember every time that man came to my office up to the 18th of October, when you say the covering was taken off, the water pouring from that eye. My recollection is that he showed very slight sense of pain from light. I did not to my recollection every time he went to my office put him in a dark room and put cocaine in his eye. I did at times. I did not make any pointed distinction about this case. As to keeping that man under treatment for two years, I did probably in treating his eyes. As to time and time again calling my partner Dr. Battle in and consulting him in the presence of this man and stating that he had a very serious eye, will say I don't remember, very probably I did call Dr. Battle in there. He had a mysterious eye to me, very mysterious. I don't remember drawing in the presence of Mr. Horton, on form 408 of the Seaboard Air Line Railway, the injury to the man's eye, when it was done, and putting that scar across it that way. (Indicates a paper in the hand of counsel.) I don't remember putting such a paper in Mr. Horton's possession to carry to Mr. Stanley. I made out a report. I don't know whether it was form 408. I generally make out a report when it is at all important. I suppose the railroad company has that report, the form 408. I don't remember drawing the wound across the man's eye in that shape. May have been, but my recollection is it was horizontal. I may be mistaken as to the direction, but as to the nature of it, I am absolutely certain. I have no doubts whatever as to the nature of the wound, but as to the direction of it, I am not certain. As to

admitting from these prescriptions that it was a very serious condition, I will say that there may have been a great deal of pain without the condition being serious or permanent. What called for those anesthetics four and eight times stronger than I usually give, the complaints of the patient called for them. Answering your question if I did not pack this man's eye in salve for 25 days, will say that I never packed an eye in the time of my practice from 1875. As to having him do it, I gave him the prescriptions, one of these prescriptions, there is aristol and vaseline, and the direction was to use it, put a little in his eye two or three times a day or night. Every few hours would be several times a day or night.

Redirect examination.

Examination conducted by Mr. Allen.

I don't remember when Mr. Horton came to me on October 18th, and prior to October 18th, whether he told me just prior to that that he had brought suit against the Seaboard on October 5th.

The defendant offers in evidence the summons, showing that suit was brought on October 5, 1910.

The defendant offers in evidence Rule 668, in Book of Rules and Regulations for the government of the employees of the Seaboard Air Line Railway in force at the time alleged in the complaint and which governed the conduct of the plaintiff, James T. Horton, in his duties as an engineer, as follows:

668. They must report for duty at the appointed times; see that the engine is in good working order and furnished with the necessary tools, stores and supplies before going to work therewith. If any defects are found therein, report thereof must be made to the proper officer. Enginemen, in making reports of the condition of engines at the end of trip, must state specifically, in writing, each and every defect which requires attention. They will give
144 checks for fuel and stores received, and assist in switching and making up trains when necessary.

Defendant offers in evidence Section 49 of the contract of employment, governing the employment of plaintiff, James T. Horton, as follows:

"Engineers must give their engines reasonable inspection, but will not be required to go underneath them."

Defendant offers in evidence the work reports of plaintiff, marked Exhibits "C," "D," "E" and "F."

Defendant offers in evidence report of Dr. K. P. Battle, marked Exhibit "G."

Defendant offers in evidence report of R. H. Lewis, marked Exhibit "H."

Defendant offers in evidence statement made by plaintiff, James T. Horton, marked Exhibit "I."

Defendant rests.

Dr. A. W. GOODWIN, a witness for plaintiff, having been duly sworn, testified as follows:

Direct examination.

Examination conducted by Mr. Douglass:

Am a medical practitioner. Have been practicing medicine 27 years and 4 months. Graduated from the Bellevue Hospital Medical College, New York City. Have complied with all of the laws of the State in respect to physicians. Am licensed to practice medicine.

Court holds that witness is medical expert.

I know J. T. Horton, and have for 10, probably 11, years. Only occasion have had to examine his eyes was simple examination for insurance policy. I think it was Brotherhood of Locomotive Engineers' policy. It was some time in the fall of 1905, I think probably November. I made a report to the Brotherhood 145 of that examination. I filled out the application and signed it and it was turned over to them. (Witness is handed a paper.) That is it.

Report of Dr. Goodwin offered in evidence by the plaintiff.

I noted on there the condition I found his eyes. I am not qualified as an eye expert. I know how to examine a man's eyes for insurance. I am not an expert on the eye. As to how I tested Mr. Horton's eyes, I simply tested by reading material, and then smaller material. I examined him for a policy to enter the Life Insurance Department of the Brotherhood. I would simply hold it up, the reading matter, and in the meantime I asked him to read certain signs away from my office window, and he could read very easily. Yes, I examined either eye or both eyes. I did not test him in reading matter across town. I happened to use at that particular time Dewar & Wilder's sign, which is across two streets. I tested both eyes, and either eye, at the same time. That sign is on the east side of Wilmington street, but it is a good large sign. My office is in the Merchants Bank Building. He read it with ease. Seemed to read it with one eye as easily as he did the other, and not only that, but similar signs, with about as much ease as the ordinary man would use. That is the test I used, and I tested him on the reading matter. Report is dated November 30, 1905.

Cross-examination.

Examination conducted by Mr. Allen:

I merely examined Mr. Horton for insurance. I was not testing his eyes with a view of determining the amount of vision he had, other than to be able to read certain matter, practical purposes. I was more interested in the question of his health that would affect the risk from the standpoint of the insurance company. They wanted to know whether he had any disease that would affect him as a risk and whether or not he was able to see such things as

146 would come in the regular way of an engineer's practical work. I did not test him with any letters, except the ordinary reading matter. Ordinary reading matter is ordinary type matter, small pica type, and I would ask him to read that some distance away. That's one way I had to tell whether he was near or far sighted. I did not try to ascertain whether his vision was 20-70. I am not an eye specialist. When matters of that character come to me, when I find a defect it is turned over to a specialist. Drs. Lewis & Battle are eye specialists here in Raleigh of high standing. I consider them specialists of reputation and high standing.

Recross-examination.

Examination conducted by Mr. Simms:

Q. If the jury should find from the evidence that Mr. Horton has only 20-70 sight in one eye and normal in the other, would he in your opinion be suitable for a railroad engineer's duties?

Objection by defendant.

By the Court: In the first place, the question is whether the doctor has any opinion. Have you an opinion satisfactory to yourself about it?

A. Well, I would think it a deformity in the eye—I would imagine that was a deformity more than a disease, that is simply an opinion. I would think *in a* deformity in the world any deformity, would unfit him for the engineer's service, and in testing I did not find any—I would not like to express an opinion, but from a general medical standpoint, I am not an eye specialist, I would think he was unfit.

Objection by defendant to this question and answer. Objection overruled. Defendant excepts. Exception No. 31.

Exception No. 31.

Plaintiff offers in evidence the two prescriptions given by Dr. Lewis to the plaintiff.

147 JAMES T. HORTON, the plaintiff in this action, having been recalled, testifies as follows:

Redirect examination.

Examination conducted by Mr. Douglass:

Dr. Lewis treated me about 40 days. When I first went there I remember what Dr. Lewis told me. I had been in his office about five minutes when Dr. Lewis came. Dr. Rogers found me, and he came up and I was suffering and he put some cocaine or some liquid medicine in my eye and waited a few minutes and put some more medicine there and put me in his chair and pulled my eye open and said he could see it and it was in a dangerous place. And he wrote me the prescriptions for this salve and told me to take it on the end of my finger and put all I could in it, keep the eye packed until he

told me to quit, and I went to the Tucker Building Pharmacy and had the prescription filled, and he told me to get a patch and keep it over there until he told me to take it off, and I used the patch 15 or 20 days, and then I used a pair of smoke-glasses about 60 days. When I went back, he took off the patch and my eye would run water, and then he would sit me in the darker corner of the office and put some cocaine in my eye and I would sit there about 30 minutes and then he would put me in the chair and treat my eye. Yes, I saw the form 408 made out in Dr. Lewis' office. He signed it.

Mr. Allen produces the report filled out by Dr. Lewis.

As to the witness Hopkins who was on the stand here and stated that we had a conversation down by the old brick warehouse or office building, in which I stated that I had only 2 or 3-5th- of an eye, will say as to that conversation it is not true. I never had any such conversation with him and he knows it. They put a witness named Burrus on the stand here who stated something I had said to him about whiskey and fighting chickens in connection with the statement that I did not report the absence of the guard glass for reasons best known to myself, I will say I do not drink, but it is generally known that I fight chickens and I do not make any secret of it. I never said anything to him about fighting chickens or about drinking whiskey in connection with this report. No, I did not make any statement substantially like the one he said I made. As to the witness Benton, my fireman, saying anything to me or hearing him make any statement at the time in the cab when he says he broke this shield to the water glass, I will say he never opened his mouth to me about a shield in his life.

The plaintiff introduces in evidence the report filled out by Dr. Lewis, marked Exhibit "H."

I belong to the State Guard of North Carolina. Belonged to it from 1894 of '95 to about 1902 or '03. I had to get out of that in order to join the Brotherhood. They do not allow organized labor in the State Guard. I was a target shooter. As to how I would use my eyes for that, when we went to camp, at Morehead City, Wrightsville or Charleston I ranked second or third, and sometimes I won the medal. Used the right eye. The rules require that you shoot from the right shoulder. Was a huntsman up to that time, all of the time I lived in the country I was, and when I moved to Raleigh went 2 or 3 times a season. At least half of it I used my right eye, except for rabbits. It is a cinch to kill a rabbit. Since this injury, I cannot use my right eye, so I have given up hunting. I cannot shoot from my left shoulder. Have been hunting and tried to shoot from my right shoulder. Went with Mr. Brown and Mr. Linehan and shot at 2 or 3 rabbits and missed them. As to discovering impairment in my vision in trying to shoot that way, I discovered that I could not hit them.

Recross-examination.

Examination conducted by Judge Biggs:

Q. I understand from you, whatever Mr. Benton or Mr.
149 Barrus or Mr. Hopkins or Mr. Matthews testified to differently
from your recollection is not true?

Objection by plaintiff. Objection sustained.
Defendant excepts. Exception No. 32.
Exception No. 32.

Q. You say that what Mr. Hopkins said contrary to what you said
is not true?

Objection by plaintiff. Objection sustained.
Defendant excepts. Exception No. 33.
Exception No. 33.

Q. Didn't I understand you to say what Mr. Hopkins said was
not true?

Objection by plaintiff. Objection sustained.
Defendant excepts. Exception No. 34.
Exception No. 34.

By the Court: I do not think that is the way to examine a witness.
I think you may direct his attention to any particular thing and ask
if that happened.

I am not mistaken as to my recollection of what happened between
myself and Mr. Burrus. Could not be mistaken. Could not be mis-
taken in what occurred between myself and Mr. Hopkins. I would
not tell Mr. Hopkins or any other engineer—no, I am not mistaken.
No, I could not be mistaken in my recollection about what Mr. Ben-
ton said about this guard glass dropping down there in front of me.
No, I could not be mistaken about that. No, I could not be mistaken
about my recollection as to the conversation with Mr. Powie Mat-
thews.

Q. You do admit, don't you, that on the first trial of this case
you did not testify that Mr. Matthews told you to go on and
150 run the engine as it was and he would get one from Ports-
mouth?

By the Court: That is nothing new. He does not say, as I under-
stand it, whether he did or did not say it upon that examination.
That has been gone into on the direct examination.

Yes, I took the report that Dr. Lewis made out in 1910 to the Sea-
board. He made out form 408. He gave that to me to deliver to Mr.
Stanley, the Claim Agent. As to whether it was customary to give it
to the man that was injured who was examined, will say that was the
first time I was ever injured. No, that was not the first time I was
ever examined by an oculist. Dr. Battle did not give the report to
me, he examined Mr. Barbee and me and phoned the Chief Dis-
patcher. As to whether I was examined by Dr. Battle on April 18,
1905, at the same time Mr. Edgar Barbee was examined, will say I
was examined some time that spring. We were examined at the

same time, but he called us in one at the time. That examination was by Dr. Battle and not Dr. Lewis. No, Dr. Battle did not give me that report to take to the Seaboard, he did not give me anything. Whether the form that Dr. Lewis gave me in 1910 was 64 or 408, will say that it looked like 408. It was the same color and size. I did not look at the form number. We make out a form just like that. It was a yellow form. I thing it was 408. This is the one he gave me. The one he gave me he drew an eye like the injury was and drew a line through it. He drew one with pen and ink. Yes, there is an eye drawn with pen and ink and there is an eye drawn with pencil. That may be the one, but it does not look as large as the one he drew. He gave me that after I had been treated by him for some 30 or 40 days. Yes, I find stamped on that Received September 21, 1910. I don't know what stamp it is, whether it is the railroad stamp or not. It says Received, I can not make out that word before Agent.

As to whether at the time Dr. Lewis gave me that prescription on October 18th I had filed my suit some ten days before that against the railroad company for \$50,000 damages, will say I don't remember what day I filed my suit. Yes, that is my signature. The date of that is the 5th of October, 1910. I don't know whether that is the prosecution bond or not. Signed by J. T. Horton and J. S. Horton. He is my brother. I started this suit on the 5th of October, 1910. I don't remember how long after that it was when I got this last prescription from Dr. Lewis. If it was the 18th of October, it was 13 days. According to these papers, at the time I was up there complaining to Dr. Lewis of pain, I had already brought this suit. I think I did. If I thought I needed attention, I would not hesitate to go to him no time. I went there and got that prescription from him and complained of pain. Yes, I had employed 4 or 5 lawyers to sue the railroad company for \$50,000 damages.

Redirect examination.

Examination conducted by Mr. Douglass:

At the time Dr. Battle examined Mr. Barbee and me, he said nothing to me about any defect in my eye.

The plaintiff offers in evidence the surgeon's report made out by Dr. Lewis, dated Raleigh, September 19, 1910, and one that has been identified. Same is admitted by the court for the purpose of corroborating Dr. Lewis. E-hibit "H."

ERNEST HORTON, a witness for plaintiff, having been duly sworn, testifies as follows:

Direct examination.

Examination conducted by Mr. Douglass:

Am a brother of James T. Horton. I live in Florenceville for the last three years off and on. I run an engine on the Atlantic

Coast Line. Have worked for the Seaboard. First railroad
152 work I ever did was with the Seaboard. Don't know how
long I worked with them, 7 or 8 or 9 years. August 4, 1910,
we were living on Halifax Street in Raleigh, in the same house with
J. T. Horton. I roomed with him. I ran engine 752 on August 1st
and 2d, 1910, on trains 1 and 2 to Aberdeen and return to Raleigh.
He ran it just before I did. He ran it and I ran it, and then he ran
it and got hurt. He ran it trip after I did. I brought the engine to
Raleigh and turned it over to the company, and then he ran it a
trip before he was hurt on the morning of August 4th. Yes, I know
about the shield or guard glass to the Buckner water glass. That
was a supply, not a part of the equipment. The proper means of
obtaining a guard glass to the Buckner gauge would be to go to the
round house clerk and get a requisition for it and get it o. k.-ed by
the foreman and go to the store room and draw it like you would a
white or red lamp or fusee or torpedoes, oil cans, or anythink like
that.

Q. What would be the proper thing to do, or would it be the proper
thing in the event there was no guard glass on the water gauge to
shut off the water glass and run the engine with the gauge cocks?

A. I ran an engine over there for 4 years and I never shut the
glass off.

Objection by Mr. Allen for the defendant, asking that this be
stricken out. Objection overruled. Defendant excepts. Excep-
tion No. 35.

Exception No. 35.

By the Court: He is asked what is the proper and safe way to do.

The proper way in my opinion would be to run with the water
glass turned on. As to the condition or the character of the water
about the time J. T. Horton was injured, will say that the water we
were getting around Johnson Street was slops pumped from
153 the drains down out of the branch, and the water from the
cotton factory ran into the branch also, and it was very muddy
all of the time. What effect, if any, will that have on the gauge
cocks, any corrosion in the water will stop a small steam passage like
through a gauge cock. At that time the Seaboard had two engine in-
spectors, one for the night and one for the day. The duties of the
engine inspector was to take the engine over, and he is required to
get under the engine where the engineers are not required to go. He
goes over all parts of the engine, and anything that the engineer
might overlook, anything he did not find, maybe the engine in-
spectors would find it and report it. It was the duty of the engine
inspector to inspect in the cab also, any part of the locomotive from
the tank to the front of the engine. It was customary for the engine
inspectors to inspect for and report any parts that were missing about
the cabs, such as water gauge glasses, anything pertaining to a loco-
motive at all. I remember the time that J. T. Horton got hurt. I
was following him in here that afternoon from Monroe. They told
me about it at Monroe. The first time I saw him, I don't remem-
ber the exact arriving time, but I got here before night and when I

got home he was there. He did not undress his eye that night; before we went to bed for the night he asked me to drop some of the liquid that he had there in his eye. I looked into his eye, yes. His right eye. I could see a cut across there made by something kind of sharp. His eye was very much inflamed that night. The next morning I dropped some medicine in his eye. I was called to go out on the run he was hurt on, next morning. As to how long I was with him, I went to Aberdeen that morning and got there that evening and came back the next evening, and he was at home. I was with him for some time after that. As to suffering, he carried his eye bandaged up with cotton behind that, that he wore for the first number of days, I don't remember exactly the number, but after Dr. Lewis removed that he gave him some smoked glasses to wear, and his eye continued to run water after that when he raised the
 154 glass. As to whether he suffered at night or day, he suffered a great deal for the first week. That was when the cut was new. Yes, my brother complained of his eye after he took the bandage off. He said it continued to pain him. As to his ability to see, after he removed the smoked glasses, he told me that it seemed like there was a thread across his eye, like this, and he tried to peep by on both sides, like this, and his vision is turned with it. Like a string across his eye. And he was trying to peep over or under it. I was standing at the Masonic Temple when a conversation was had between J. T. Horton and Mr. Edgar Barbee some time before the first trial in this case. Mr. Barbee was talking to my brother, and he went on and said he would not do him any injury if he was examined for the company, that he did not know anything that could injure him as he was a good engineer. In that conversation he said not a thing in the world about his eyes at the time that they were examined. As to being present with my brother and Hopkins at the time Hopkins referred to, me and my brother were there and engineer P. P. Bishop went around to visit Mr. Shott after he got his eyes hurt, and Mr. Hopkins he was around there, that one visit; we went around there, me and my brother went together every time he went over there, and Mr. Hopkins did not come away with us, with me and my brother and Mr. Bishop. We came around to Johnson street and to the North Side Drug Store and Mr. Hopkins did not accompany us from the house there. While Mr. Hopkins was in the presence of my brother, my brother did not say a thing in the world about anything being the matter with his eyes. I was hostler down there before I was promoted. Was hostler for Pendleton or any other engineer who came in there. As to whether Pendleton ever cut off a water gauge, I never found one cut off in my life, and I set out engines on both the first and second divisions. As to the guard glass, they had old steel casing for the water glass tube. Like that. The water valves were never cut off.

155 Cross-examination.

Examination conducted by Mr. Allen:

I am now a member of the Brotherhood of Locomotive Engineers, in good standing. At one time I was not. I was discharged by the

Seaboard and then expelled by the Brotherhood of Locomotive Engineers. I believe I remember being asked something at the last trial, it has been so long ago, being shown a statement I made about the guard glass on engine 752, and I said it was not correct, saying that I was not swearing when I made that statement. Yes, if I did, I said I was trying to protect myself when I said I was not swearing when I answered those questions. I ran engine 752 more than one trip from the time I took and the time my brother got hurt. It was on August 1st and 2d. I stated that I did not notice particularly whether the guard glass was on there or not. I now say it was not on there. I suppose the statement I made to Mr. Burrus about the matter was not correct. Yes, before Mr. Burrus I was asked the question "Was the fixture equipped with a guard glass," and I answered "Yes," because I took it out and cleaned it at Johnson street to enable me to see the water. That was the trip behind him when he was hurt. That was August 5th when the guard glass was in there. As to my being asked This was the first engine you have run with this special fixture, did you notice on this trip that the engine was equipped with the special fixtures, I answered No, I did not notice this special feature. That statement was made on August 11th, whenever it was dated. As to whether the answer I gave to Mr. Burrus was incorrect, I told him what I told him. Don't remember about it. Whatever I swore to I said. As to being sworn before Mr. Burrus, I was not sworn before a notary public. If I said at the last trial that in answering those questions I was not swearing then, that is what I said. As to whether I said that, I refer you to the record. I don't know whether I said it, it has been four years ago. As to it being correct that I did not
 156 make a correct statement to Mr. Burrus, he had something there that I signed. I don't know what he turned in. He may have had another paper under it and I signed that and he sent that in. I don't remember telling him that the guard glass was off. Whether if I told him then that I did not notice the guard glass was off being true or untrue, I don't remember telling him.

If I told Mr. Burrus that I did not notice the guard glass, it was not true?

By the Court: He says now he has distinct recollection it was not in there.

By Mr. Allen: But he said at that time he did not know.

By the Court: He says now that that was not correct.

Answering your question, didn't you on the last trial swear that you made a statement to Mr. Burrus that you did not notice the guard glass was gone on August 1st, when you took the engine, and that you made that statement because you were not under oath, will say I think I did. As to any inspection of the cab, the engineer is entirely in charge of his engine, entirely in charge of his cab and everything about the engine. The water glass and the gauge cocks are right upon the head of the boiler, right at his hand, and he has to use them in running his engine, not constantly, though. They are there all the time for his use. By turning those

three gauge cocks you can gauge somewhere near about the water in the boiler, but you can not tell the perfect level. If you try the gauge cock and it is below the second, the engineer has means by which he can put more water in the boiler, by means of the injector. If the engineer turns the top cock and water comes out, he knows the water is up that high in the boiler, but if water does not come out of the top cock and does come out of the second cock, he knows that the water is then below the top cock and above the second cock, and if he turns the second cock and it does not
157 come out and he turns the third cock and it does come out, he knows that the water is below the second cock and above the third. As to whether when it shows between the first and second, more water is put in, will say different engineers have different rules. As to being dangerous when below the third, I have seen it below. If I am running an engine and it gets below the third, I keep putting water in her. The Buckner glass is a part of the fixtures in the cab. Lens guard glass is part of the Buckner water gauge, it is just the glass shield. He did not patent the water glass, he patented the holder for it. The glass is a part of that gauge. The Buckner gauge is not complete unless that glass is in there. One piece of thick glass is as good as another for that. It does not have to be ground or any particular process, just so it is cut to fit down in there. As to when I was over there whether I observed the rules of the company while running an engine, some rules I observed and some I did not. Answering the question, You observed those you wanted to and ignored those you did not, will say, well, Rule Q is supposed to be observed, but lots of fellows go into the ends of trains by not observing it. That requires you to be— to stay under perfect control between stations. As to my observing the rules, I did observe all I could. I never did have any trouble. I made my work reports. Did not carry these yellow slips on my cab. Got them from the round house. When I came in, would go in the round house and make out work reports for work needed on my engine. That is the way I did it. The guard glass on the Buckner water gauge is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. As to why it is necessary to have a guard glass in there, that particular shield was patented for that. (Witness holds up the Buckner gauge.) As to showing you the purpose of the guard, he patented it for the special protection that was gotten from it. It has not been patented so very long. I could not tell
158 you whether it is an expensive gauge, whether it cost or did not. This glass is put in there to prevent the glass from spattering out in case that glass bursts. I have just answered why you want a protection in front of this glass tube here. I have just told you why you need a glass protection in here, to keep the glass here from spattering out. The same amount of steam is in there as in the boiler, 150, 180, or 200. This is a protection to the engineer from the power of steam that comes down in that small tube. Every engineer knows that the same amount of power in the boiler comes down in this small tube. I do not know

about these glass tubes wearing. I know that they explode, but I don't know about them wearing. Don't have any warning when they will explode. They may last a day, a week, a month or a year, and it may last an hour or shorter. As to running an engine without the water glass, when they break with me on the road, I shut them off and run without them. Then use the gauge cocks to tell how much water is in the boiler.

Redirect examination.

Examination conducted by Mr. Douglass:

As to the work reports, whether it was customary to put on them such supplies as lantern globes, torpedoes, and glasses, guard glasses, will say if you put lanterns or globes or anything like that on the work reports, they would tell you to get a requisition and get them yourself. They were not put on by the machinist.

The reason why I was discharged, my trouble was fighting off duty. At least my dismissal paper said I was dismissed from the service of the company for an altercation. Was the man I had the altercation with discharged also? He was put back to work. I was not put back. That was after this suit was started. As to being discharged from the Brotherhood of Locomotive Engineers also, I wrote my case up to them and they refused to handle it. I was expelled from the Brotherhood of Locomotive Engineers afterwards. That was for the same thing. I was restored to the Brotherhood and obtained employment with the Atlantic Coast Line, and am in their employment now.

Recross-examination.

Examination conducted by Mr. Allen:

I asked the Brotherhood to take up the matter of my reinstatement with the Seaboard and they would not do it. I wanted the Committee to handle it. As to the Brotherhood saying that they would not have anything to do with it, I don't know what they said. I was exonerated by Division 339, here in Raleigh, but it was the Division in Hamlet which expelled me.

The plaintiff rests.

Dr. R. H. LEWIS, a witness for the defendant, having been recalled, testifies as follows:

Redirect examination.

Examination conducted by Judge Biggs:

That is the report (indicating) that I made to Mr. Stanley, of the Claim Department, after treating Mr. Horton. It is correctly dated, the 19th of September.

By Judge Biggs: I have compared the two, gentlemen, and I do not think there is any material difference. There is a line left off. Is that a copy?

By Mr. Douglass: If there is any question we want to introduce both.

The witness reads aloud the last line on the report.

Yes, there is an expression on there, state all the information bearing upon the case not given above, the little wound healed in 2 or 3 days but left a scar which will probably show that the true substance of the cornea was injured. Vision at first 20-200, now not quite 20-50.

160 I will state to the jury what that means, and how it bears upon my subsequent discovery of the old scar reported by Dr. Battle.

Objection by Mr. Douglass for plaintiff. Objection overruled except as to the old scar reported by Dr. Battle. Exception.

I understand you are directing my attention with reference to that statement that the wound has healed, that the cut has healed, but there is a scar there.

This little fine cut, transversely across the cornea, healed entirely, and I examined his eye to find out if there was any scar, and I told him in the beginning if it went deep enough to cut the true substance of the cornea there would probably be a scar or would interfere with his vision, and upon making this careful examination after the little cut healed up, I found a scar in the true substance of the cornea, very much broader, however. The streak was very much broader than the original cut I saw. He had no inflammation of the wound, it healed up as we surgeons say by the first intention, that is, without pus or matter, and when it heals up by first intention, without pus, it leaves no scar, and I could not understand why he should have had a scar, but as I knew nothing about the eye prior to the injury, and he had an injury to the eye in that general neighborhood, I supposed the scar came from the injury.

I do not remember making any other report to the railroad company than that one. I did not make more than one. It was made for Mr. Stanley.

Recross-examination.

Examination conducted by Mr. Douglass:

As to making out a 408 report, I don't know what 408 is. When I got in this wonderment and did not understand the scar, why did not I make another report; carelessness, I suppose. Yes, I said that, while it was still fresh, that the little wound healed in
161 two or three days, but left a scar which still persists. That is what I said and it was so in my judgment at the time, having no further information showing that another injury caused the scar. That further information has been brought out since Dr. Battle's report. When I wrote that, it was my opinion, but since that time I have gotten new information with reference to his cornea. I say in the absence of any further explanation the probability is that the wound left the scar. Yes, I say there posi-

tively that it did leave a scar which still persists, showing that the true substance of the cornea was injured, vision at first 20-200, pretty bad vision, and then it came to 20-50, which is really better than 20-70. In the healing of the wound I am talking about the vision got a little better. I knew I had made that report. Don't remember why I did not have this report introduced to refresh my mind when I went on the stand the first time.

Defendant closes.

Plaintiff closes.

At the conclusion of all the evidence defendant moves to dismiss the action and for judgment of nonsuit. Motion overruled and defendant excepts. Exception No. 36.

Exception No. 36.

EXHIBIT "C."

Seaboard Air Line Railway—Form 684.

Report on Condition of Engine No. 752, After Careful Inspection, on Arrival at Raleigh, 3.30 P. M., 7-28, 1910.

Engine is in good condition, with the following exceptions:

Engine brakes don't hold leak off; connect up tank brakes. Put brake shoes on where needed. Set up both main wedges. Put new ring in air pump and examine.

Train pipe pressure, — lbs.

Main drum pressure, — lbs.

Safety valve lifts at — lbs.

Safety valve seats at — lbs.

162 State whether this engine throws fire dangerously.

(Signed)

J. T. HORTON, *Engineman.*

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given verbal reports or reports not signed by enginemen.

Flat places on D. wheels.

(On opposite side.)

Repaired at — on —, 191—.

The following repairs were made to Engine No. —.

Both M. wedges set up; brakes fixed. Mitchell.

Repairs made by — —.

(Name of workman in charge of work.)

Approved by—

E. C. D., *Foreman Roundhouse.*

NOTE.—Workmen in charge of the work will sign for the repairs done, and must be approved by foreman of Roundhouse and forwarded by him to Master Mechanic.

EXHIBIT "D."

Seaboard Air Line Railway—Form 684.

*Report on Condition of Engine No. 752, After Careful Inspection
on Arrival at —, — — M., 7-28, 19—.*

Engine in good condition, with the following exception:

Valves—Pack air and steam end of pump. Engine pounding.
Bad in all D boxes and rod bolts to both front end of both side rods
work loose. Reduce brass to back end of both main rods.

Train pipe pressure—60 lbs.

Main drum pressure—70 lbs.

Safety valve lifts at—200 lbs.

Safety valve seats at—195 lbs.

163 State whether this fire throws fire dangerously.

(Signed)

J. T. HORTON, *Engineman.*

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.

(On opposite side.)

Repaired at — on — —, 191—.

The following repairs were made to Engine No. —.

Sand pipes opened. Hester.

Repairs made by — —.

(Name of workman in charge of work.)

Approved by—

E. C. D., *Foreman Roundhouse.*

NOTE.—Workman in charge of the work will sign for the repairs done, and must be approved by foreman of Roundhouse and forwarded by him to Master Mechanic.

EXHIBIT "E."

Seaboard Air Line Railway—Form 684.

*Report on Condition of Engine No. 752, After Careful Inspection
on Arrival at Raleigh, 5.45 P. M., 7-30, 1910.*

Engine in good condition, with the following exception:

Road brake beam and back tank truck brake. Adjust piston travel to tank. It is about 12 inches long. Clean brake cylinder to tank. Brakes on engine and tank no good.

Train pipe pressure—50 lbs.

Main drum pressure—60 lbs.

Safety valve lifts at—200 lbs.

Safety valve seats at—195 lbs.

164 State whether this engine throws fire dangerously.

No.

(Signed)

J. T. HORTON, *Engineman*.

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.

Raise seat box 8 inches.

(On opposite side.)

Repaired at — on — —, 191—.

The following repairs were made to Engine No. —.

Repairs made by — —.

(Name of workman in charge of work.)

Approved by—

P. M. M., *Foreman Roundhouse*.

NOTE.—Workmen in charge of the work will sign for the repairs done, and must be approved by foreman of Roundhouse and forwarded by him to Master Mechanic.

EXHIBIT "F."

Seaboard Air Line Railway—Form 684.

Report on Condition of Engine No. 752, After Careful Inspection on Arrival at Raleigh, 5.45 P. M., 7-30, 1910.

Engine in good condition, with the following exception:

Collars to front end of both side rods work loose. Put new rings in air end of pump and examine valves. Pump don't keep up pressure. Examine steam end of pump. It stops all over.

Train pipe pressure, — lbs.

Main drum pressure, —.

Safety valve lifts at — lbs.

Safety valve seats at — lbs.

165 State whether this engine throws fire dangerously.

(Signed)

J. T. HORTON, *Engineman*.

NOTE.—Enginemen must carefully inspect their engines after each trip and report their condition on this form, whether needing repairs or not. They will be held responsible for defects not reported. No attention will be given to verbal reports or reports not signed by enginemen.

Put new bushing in R. -nuckle pin.

(On opposite side.)

Repaired at — on — —, 191—.

The following repairs were made to Engine 752.

Examined valves and rings in air end of air pump and put all of them back. Bynum.

Tightened side rod collar. Renewed R. -nuckle bushing. Mitchell.

Repairs made by — —.

(Name of workman in charge of work.)

Approved by—

P. M. M., Foreman Roundhouse.

NOTE.—Workmen in charge of the work will sign for the repairs done, and must be approved by foreman of Roundhouse and forwarded by him to Master Mechanic.

EXHIBIT "G."

Seaboard Air Line Railway.

Certificate as to Hearing, Visual Power, and Color Perception.

RALEIGH, N. C., April 18, 1905.

Name—J. T. Horton; white.

Division, Second—Occupation, engineer—age, 24.

Acuteness of sight and hearing: Distant vision—right eye, 20-70;

left eye, 20-20; normal.

166 Near Vision—Right eye, No. 2 J from 8 to 4 and even

No. 5 in, with some slight difficulty. Left eye, No. 1 J;

normal.

Hearing—Right ear, whisper at 6 ft.; normal. Left ear, whisper at 6 ft.; normal.

Color sense—Test skeins, light green. Names given —; selection of similar tints.

A. Green, all shades correctly picked. Color sense normal.

B. Rose

C. Red

D. Blue

Flag shown Name Remarks

Soiled white

Soiled green

Soiled red

Soiled Blue

Examination approved.

W. R. HUDSON.

R. H. LEWIS, M. D.,

By K. BATTLE, JR., M. D.,

Sup't Second Division Surgeon.

NOTE.—There is a very slight linear scar on cornea, visible on close inspection only, which is the cause and the only cause of the slight interference with vision in the right eye. It is very old, and if it ever changes it will be for the better instead of worse. There is no disease in the eye whatever.

K. BATTLE, JR.

EXHIBIT "H."

Seaboard Air Line Railway.

Surgeon's Initial Report of the Accident.

Mr. W. L. Stanley, Claims Attorney.

RALEIGH, N. C., Sept. 19, 1910.

Below please find report of accident to which I was called by Dr.

J. R. Rogers at 3:25 P. M. on August 4, 1910:

167 Name—James T. Horton; age, 31; sex, male.

Residence—Raleigh, N. C.; destination—Raleigh, N. C.

Employee on Second Division.

Occupation—Engineer.

Date of injury—1:45 P. M., August 4, 1910. Place of accident—Apex, N. C. Injured by engine No. 752.

What was said by injured party as to cause, etc.?—Right eye struck by fragment of exploded water glass, causing severe pain, nausea and vomiting immediately.

Names and addresses of those who saw or know particulars concerning accident—He suggests W. F. Benton, fireman; Claude Orrell, conductor, and Willis Crump, brakeman.

Location, nature and extent of injuries—A fine shallow horizontal cut from 1-8 to 3-16 inch long across the cornea just a shade below its exact center crossing the lower half of the pupil. There was a slight hyperæmia of the lower root of the ocular conjunctiva but none of the upper. No other injury could be found. Vision—20-200. Photophobia or dread of light was marked.

What services were rendered?—A mild antiseptic wash, protection of light and rest ordered.

Disposition made of injured person—Ordered to return from time to time that the case might be watched.

Has patient any accident policy?—No.

Prognosis—Depended upon whether the cut extended into true substance of cornea which would leave scar.

Probable duration of disability—Two or three weeks.

State all information bearing on the case not given above—The little wound healed in two or three days but left a scar which still persists showing that the true substance of the cornea was injured. Vision at first 20-200 is now not quite 20-50.

RICHARD H. LEWIS,
Surgeon, Raleigh, N. C.

The scar will probably be permanent but as time passes will thin to some extent. With the amount of sight in the injured eye and standard vision in the other has very good practical sight.

EXHIBIT "I."

Statement of Engineer J. T. Horton Covering Injury to Right Eye, Account Water Glass Burst on Engine 752, at Apex, August 4th, Parts of Glass Striking Him in Right Eye.

RALEIGH, N. C., August 9, 1910.

I had stopped engine 752 on house track at Apex with local cars, and was facing water glass when glass burst, parts of flying glass striking me in right eye, cutting same; extent of damage to eye not yet known.

Q. What kind of water glass fixture was engine 752 equipped with?

A. Special water glass fixture, which, I understand, was gotten up by Engineer Buckner.

Q. Was this fixture equipped with guard glass when trouble occurred?

A. No, sir. It has had no guard glass on it since I have been running this engine.

Q. Did you know the construction of this fixture—that is, what is required?

A. Yes, sir; I knew this fixture was constructed for guard glass.

Q. According to your statement, this fixture was not equipped with guard glass when you made first trip on engine, July 28th. According to register, you made three trips of this engine since July 28th. Had you made report as to this fixture not being equipped with guard glass?

A. No, sir.

Q. Why?

A. Overlooked reporting guard glass in water shield for causes best known to myself.

(Signed)

J. T. HORTON.

Witness:

W. S. BURRUS.

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Defendant's Request for Instructions.

The defendant in apt time in writing requested the Court to instruct the jury as follows:

1. The Court charges you that if you believe the evidence, the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue "No."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 37.

2. The Court charges you that if you believe the evidence, the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 38.

3. If you do not answer the second issue "Yes," then the Court charges you that if you believe the evidence, the plaintiff by his own negligence contributed to his injury, and you will answer the third issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 39.

4. The Court charges you that the statute of North Carolina, Revisal Section 2646, abolishing assumption of risk as a defence to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue "Yes."

5. The Court instructs you that upon all the evidence in this case the absence of the guard glass and the risk incident to the use of the water gauge in that condition were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, and if plaintiff reported the absence of the guard glass to defendant's foreman and the foreman gave him a promise to repair, a reasonable time for the performance of such promise had expired, and plaintiff assumed the risk of injury and you will answer the second issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 40.

6. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, the danger was so imminent that no ordinarily prudent man, under the circumstances would have relief upon such promise, and plaintiff assumed the risk of injury, and you will answer the second issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 41.

7. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, there is no evidence that he was induced by such promise to continue to use the engine with the water gauge in a defective condition, and you will answer the second issue "Yes."

171 The Court refused to give this instruction, and the defendant excepts.

Exception No. 42.

8. The Court instructs you that the absence of the guard glass and the risk incident thereto were so obvious that an ordinary prudent

person would have observed and appreciated them, and you will answer the second issue "Yes," unless plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair.

The Court refused to give this instruction, and the defendant excepts.

Exception No. 43.

9. If you find that the plaintiff reported the absence of the guard glass and was given a promise to repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the Court instructs you to answer the second issue as to assumption of risk, "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 44.

10. If the jury shall find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass without the glass, and that he reported the absence of the guard glass and was given a promise to repair, the Court charges you that under the Federal Employers' Liability Act the burden of proof is on the plaintiff to satisfy you by a preponderance of the evidence that he was induced to continue in the employment by his reliance
172 upon the fulfillment of the promise, and if plaintiff has failed to satisfy you, you will answer the second issue "Yes."

11. If you find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass, without the guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue "Yes," unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair and that he was induced by such promise to continue in the employment.

The Court modified the instruction by adding at the end thereof: "That is, relying on that promise he continued to use the engine."

To this modification, defendant excepts.

Exception No. 45.

12. If you find that plaintiff appreciated the danger from the use of the water gauge without the guard glass, the Court charges you that the burden is upon the plaintiff to satisfy you by a preponderance of evidence that a promise of repair was given by some agent of the defendant authorized to make it, and that his reliance upon the promise was the inducing motive for his consenting to subject himself to the danger, and if he has failed to do so, you will answer the second issue "Yes."

13. If you answer the first issue "Yes," then the Court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's round house foreman that the guard glass was gone and was given a promise of repair, the time reason-

- ably required for the performance of this promise had expired at the time of the explosion of the water glass and you will answer the second issue "Yes."
- 173

The Court refused to give this instruction, and the defendant excepts.

Exception No. 46.

14. If you find that plaintiff appreciated the risk and that a reasonably prudent man would not have continued to use the water gauge in the absence of the guard glass, the Court instructs you that under the Federal Employers' Liability Act, plaintiff assumed the risk, and you will answer the second issue "Yes."

15. The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Liability Act enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which the plaintiff was employed was not provided with a guard glass and the condition of the water glass was open and obvious and was fully known to the plaintiff and he continued to use such water glass with such knowledge and without objection and that he knew the risk incident thereto; then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."

16. If you answer the first issue "Yes," and the second issue "No," and if you find by the greater weight of the evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff was guilty of contributory negligence and you will answer the third issue "Yes."

174 17. If you find by the greater weight of the evidence that the water glass was defective and that the plaintiff knew of the condition of the water glass on the engine and appreciated the danger incident to its use and that there was open to him a safe way of operating said engine by using the gauge cocks and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass and you will answer the second issue "Yes."

18. If you answer the first issue "Yes," and if you find by the greater weight of the evidence that the plaintiff appreciated the danger incident to the use of the water glass without the guard glass and that he could have shut off the glass, and operated his engine with safety by using the gauge cocks on his engine and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue "Yes."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 47.

19. If you answer the first issue "Yes," then the Court charges you that if you find by the preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff and that he continued to use the said glass with such knowledge and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk and you will answer the second issue "Yes."

20. The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the greater weight of the evidence, you will answer the first issue "No."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 48.

21. If you find from the evidence that the engine could have been operated in safety by cutting off the water glass and using the gauge cocks and that the plaintiff continued to use the water glass when he knew there was no guard glass on it and that it was dangerous to use the water glass in that condition, you will answer the first issue "No."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 49.

22. If you find from the evidence that the plaintiff could have performed his duties in operating the engine by using the gauge cocks for the purpose of telling how much water was in the boiler, and he continued to use the water glass without the guard glass, you will answer the first issue "No."

The Court refused to give this instruction, and the defendant excepts.

Exception No. 50.

23. If you find from the evidence that the guard glass was in its proper place on the engine when the plaintiff started on his run on the morning of July 27, 1910, and that the defendant had no knowledge of the absence of such guard, and it was plaintiff's duty to make note of the absence of the guard glass in writing on his work report and he failed to do so, and you further find that defendant's failure to have knowledge of the absence of the guard glass was due solely to defendant's reliance upon the performance of plaintiff's duty to make report in writing, of the absence of the guard glass, the Court instructs you that there has been no negligence on the part of the defendant, and you will answer the first issue "No."

WINSTON & BIGGS,
MURRAY ALLEN,
Attorneys for Defendant.

Judge's Charge.

The Court charged the jury as follows:

Now, gentlemen of the Jury, this is an action instituted by the plaintiff under the Federal Statute, which we lawyers, in order to designate it, call the Federal Employers' Liability Statute.

That statute provides that a person seeking relief under it may institute his suit either in the Federal Court or in the State court at his pleasure, but when it is instituted in the State court, the State court is governed by the law as laid down by the Federal Courts. In other words, we try it in this court exactly in the same manner as if it were tried in the Federal Court, and we are bound by the Federal decisions applicable to this particular statute.

I deem it my duty to tell you in order that you may see the necessity of it that in this particular case the Supreme Court of North Carolina and the Supreme Court of the United States do not agree upon what rules of law are applicable to this particular case, but we are compelled to accept as the law, and it is the law that which is laid down in this particular case by the Supreme Court of the United States.

I shall endeavor as near as in my power to apply to this case the rules of law which have been laid down in this particular case by the Supreme Court of the United States.

There was a denial of the right of the plaintiff in the first
177 instance to bring this action under the Federal Statute, because it was denied that the injured employee was actually engaged in interstate commerce. That has been gotten out of the way, and is not at issue, it having been admitted in open court that the employee at the time of the alleged injury was engaged in interstate commerce within the meaning of the act, and that, therefore, this suit is properly triable in this case under that act, but it must be tried in accordance with that act and in accordance with the interpretation by the Supreme Court of the United States and not in accordance with the Supreme Court of North Carolina.

In that decision, and I will charge you about that later, the Supreme Court of the United States holds, now holds that under the statute assumption of risk is a defense to an action of this character.

In North Carolina that is not so, but it is so in this case. The Supreme Court of the United States has said so, and when established by the defendant who alleges it, it is an absolute bar to recovery under this statute. So that much is settled.

Prior to the last Legislature, when a man was guilty of contributory negligence under the North Carolina law, and it was so found by a jury by the preponderance of evidence, that prevented him from recovery at all. That was also a bar. But under the Federal Statute, it is not a bar to a recovery, but as the statute says, contributory negligence shall not bar recovery but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee. In other words, it does away with the absolute bar, but the damages shall be diminished in pro-

portion to the negligence attributable to the plaintiff, if there should be any, if you find any.

With these general remarks, I am going to try as nearly as possible to charge you exactly what the Supreme Court of the United States has said is the law applicable to this particular case.

178 They have held that the common law rule of negligence and the common law duty imposed upon the common carrier is the rule applicable in this case.

(They, as I understand the decision, and as I charge you the decision is, hold it is not the duty of the railroad company, not an absolute duty that the railroad company owes to a servant to furnish an absolutely safe place, or absolutely safe and secure tools and appliances and equipment with which to do his work, but that the rule is that the railroad company shall exercise ordinary care and prudence to the end that—I want to use the exact language—to the end that the tools and appliances of the work may be safe for the workman. The Supreme Court of the United States says that the common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen.

It is the duty of the employer to exercise due care in respect to providing a safe place of work, and suitable and safe appliances for the work.)

To the foregoing charge in parentheses defendant excepts.

Exception No. 51.

That is the exact language which I have read you from the report of the Supreme Court of the United States in this particular case, and I charge you that that is the duty which is owed by the defendant to the plaintiff in this action.

I will try to take them up separately and try to apply these principles to the issues, which will be submitted by consent of all parties, all of the attorneys on both sides, which arise on the pleadings, which are four in number.

The first issue is, Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

179 The burden upon that issue is upon the plaintiff to satisfy you by the preponderance of the evidence or the greater weight of the evidence of the truth of that allegation. That is simply, was the plaintiff, was Mr. Horton, injured, you know what that means, a word of ordinary meaning, by the negligence of the defendant, the railroad company, as alleged in the complaint.

The allegations of negligence in the complaint are as follows, and upon which he relies for recovery in this action; that in disregard of its duty, the defendant negligently furnished to the plaintiff a locomotive engine with which to draw the aforesaid loaded cars, which was negligently and carelessly equipped with a water glass that was not modern in its make, was unsafe for use, and that was of an inferior grade and quality, which water glass was known to the defend-

ant not to be modern in its make and unsafe for use and of inferior grade and quality, and that the said water glass was imperfect in several particulars, which were also known to the defendant.

A jury in trying to discharge its duty conscientiously perhaps, if permitted, would ask the question, What do you mean by negligence, and in order that there may be no mistake as to what I say negligence is, I will ask you to listen to this. (Negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what a reasonable prudent man under the existing circumstances would not have done. That is negligence.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 52.

(And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequences of the act, and when in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced
180 thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 53.

That definition is in simple language, and would be understood by the ordinary layman, except the words "proximate cause," and in order that you may understand that, exactly what proximate cause means, I will read you a definition:

(The law is, that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not anticipate the particular injury that did happen. Consequences which flow in unbroken sequence, without an intervening cause, from the original negligent act are natural and proximate, and for such consequences the original wrong doer is responsible, even though he could not have foreseen the particular result which did follow.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 54.

(The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and second that it did actually produce it.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 55.

181 In this case the plaintiff contends that you ought to find from this evidence by its greater weight that the railroad company did not exercise ordinary care in providing him a safe place to work, and safe tools and appliances with which to do the work;

that they negligently, and when I say "negligent" I mean it as applied to the definition I have given, that they negligently furnished him an engine which did not have a shield to the water glass, and that by reason of this, without any other intervening cause, that the glass exploded and his eye was injured, and that a man of ordinary prudence could have foreseen that that would likely have resulted from such condition on their part, and that their conduct in this particular was negligence, and it caused his injury.

The defendant, on the other hand, contends that it did furnish the water glass, that it did furnish it with the guard, and when it furnished it to the plaintiff it was properly and safely equipped for use, and that it was in proper condition, and if it had been allowed to remain as it was, it would have prevented the injury, and that they carried out their full duty in this matter, and that they did not have any notice of its defect, and that there was no breach of duty on their part in failing to keep it in repair, as they contend that they had no notice and were given no notice by the plaintiff.

The plaintiff replying says that he did give notice, and that they promised to repair, and acting upon that promise he went along and used it.

What do you say about it, gentlemen? The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant was negligent, and that that negligence was the proximate cause of the injury.

Unless the plaintiff has so satisfied you by the greater weight of the evidence, you will answer the first issue "No," and if you answer the first issue "No," you need not answer any of the other issues.

182 (If you find from the evidence that the guard glass was in its proper place on the engine when the plaintiff started on his run on the morning of July 27, 1910, and that the defendant had no knowledge of the absence of such a glass, and it was the plaintiff's duty to make a note of the absence of the glass in writing on his work report, and he failed to do so, and you further find that the defendant's failure to have knowledge of the absence of the guard glass was due solely to the plaintiff's failure to make the report in writing of the absence of the guard glass, the Court instructs you that there has been no negligence on the part of the defendant, and you will answer the first issue "No.")

To the foregoing charge in parentheses, defendant excepts.
Exception No. 56.

As I have already said, if you answer the first issue "No," you need not answer the others, but if you answer it "Yes," then you will proceed to consider the second.

Now, gentlemen, the fact that I charge you on all of the issues does not mean that I think one way or the other about how you ought to answer an issue. If I had an opinion about it, it would be wrong for me to express it to you. You have to try the case and not myself, so the fact I charge you upon the second issue does not mean that I think you ought to answer the first issue "Yes" or "No," but I charge you on all of the issues in order that you may have the law applicable to all of the issues, and so you shall not construe the fact that I charge

you upon all of the issues as any indication as to how I think they ought to be answered. You shall not construe anything I say to you as how I think they should be answered, but you should answer them as you find the facts to be from the evidence by its greater weight, and you should answer them first in the order in which they come, because if you answer the first issue "No," that ends it, but if you answer it "Yes," then it is your duty to proceed to consider the second issue.

183 The second issue is, If so, did plaintiff assume the risk of injury? Therefore, if you answer the first issue "Yes," then you proceed to the second issue, Did plaintiff assume the risk of injury.

There is a distinction between contributory negligence and assumption of risk, so that you define the difference between them in this way:

(Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 57.

(Contributory negligence arises when the plaintiff as well as defendant has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 58.

(The Supreme Court in passing upon this particular case says, and it is the law so far as this case is concerned:

The distinction between contributory negligence and assumption of risk is simple. Contributory negligence involves the notion of some fault or breach of duty on the part of some employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as failure to use such care for his safety as an ordinarily prudent employee under similar circumstances would use.

On the other hand, assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present notwithstanding the exercise of all reasonable care on the part of the employee.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 59.

(Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 60.

(But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work.

These risks, the latter risks, the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 61.

(When an employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or
185 his representative an assurance that the defect will be remedied, the employee assumes the risk even though it arises out of the master's breach of duty.)

To the foregoing charge in parenthesis, defendant excepts.

Exception No. 62.

(If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.)

To the foregoing charge in parenthesis, defendant excepts.

Exception No. 63.

Gentlemen, I have read to you from the decision in this particular case, and that is the law, and the distinction between contributory negligence and assumption of risk. These are the definitions of contributory negligence which you shall observe in determining this case. That is the law.

The Court charges you that the statute of North Carolina, Revisal Section 2346, abolishing assumption of risk as a defense to an action brought against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue "Yes." Of course, bearing in mind the definition of assumption of risk that I have already given you.

If the jury shall find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass without the glass, and that he reported the absence of the guard glass and was given a promise to repair, the Court charges you that under the Federal Employers' Liability Act the burden of proof is on the
186 plaintiff to satisfy you by a preponderance of the evidence that he was induced to continue in the employment of his reliance upon the fulfillment of the promise, and if plaintiff has failed to so satisfy you, you will answer the second issue Yes.

Generally, the burden of contributory negligence and assumption of risk is upon the defendant. The burden of the first issue is upon the plaintiff. (The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defend-

ant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 64.

I say this because this particular prayer is directed at a particular state of facts which are in that particular prayer. (If you find by a preponderance of the evidence that the plaintiff appreciated the risk incident to the use of the gauge glass without the guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair and that he was induced by such promise to continue in the employment. That is, relying on that promise he continued to use that engine.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 65.

If you find that the plaintiff appreciated the danger from the use of the water gauge without the guard glass, the Court charges you that the burden is upon the plaintiff to satisfy you by a preponderance of evidence that a promise of repair was given by some agent of the defendant authorized to make it, and that his reliance upon the promise was the inducing motive for his consenting to
187 subject himself to the danger, and if he has failed to do so, you will answer the second issue Yes.

If you find that the plaintiff appreciated the risk and that a reasonably prudent man would not have continued to use the water gauge in the absence of the guard glass, the Court instructs you that under the Federal Employers' Liability Act, the plaintiff assumed the risk, and you will answer the second issue "Yes."

The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at the session of 1908, and the Court charges you that if you find by a preponderance of evidence that the water glass on the engine on which the plaintiff was employed was not provided with a guard glass and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue Yes.

If you find by the greater weight of the evidence that the water glass was defective and that the plaintiff knew of the condition of the water glass on the engine and appreciated the danger incident to its use and that there was open to him a safe way of operating said engine by using the gauge cocks and that he voluntarily used the water glass in operating the engine, the Court charges you that the plaintiff assumed the risk of injury from the use of the water glass and you will answer the second issue Yes.

If you answer the first issue Yes, then the Court charges you

that if you find by the preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff and he continued to use the said glass with such knowledge and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the Court charges you that the plaintiff assumed the risk and you will answer the second issue Yes.

(If you answer the first issue "Yes," then the Court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's round house foreman that the guard glass was gone and was given a promise of repair, yet if you should find that the time reasonably required for the performance of this promise had expired at the time of the explosion of the water glass, you will answer the second issue "Yes.")

To the foregoing charge in parentheses, defendant excepts.

Exception No. 65½.

(If you answer the second issue Yes, that he assumed the risk incident to his injury, the burden being upon the defendant to satisfy you of that by the greater weight of the evidence, you need not answer the third and fourth issues.)

To the foregoing charge in parentheses, defendants excepts.

Exception No. 66.

Because that would be a bar to the recovery under the decision of the United States Supreme Court, but if you answer the second issue No, then it is your duty to proceed to answer the third issue.

Gentlemen, the third issue is this, Did the plaintiff by his own negligence contribute to his injury?

I have in a measure gone over that on the other issues, charging you and giving you a definition upon the issue of assumption of risk.

189 The defendant says that you ought to find from this evidence that the plaintiff knew when he was leaving Johnson Street on the 27th of July, or soon after he left, upon his own evidence, that this guard glass was gone; that he knew the purpose for which it was there; that he had been an engineer for a number of years, and that he knew the risk, and that you ought to find that he assumed the risk that was incident, that he knew it was liable to explode at any time and injure him, and that he voluntarily, without any promise on anybody's part, with a perfectly safe way open to operate the engine with the gauge cocks, that he voluntarily assumed to run the engine with this water glass in this known, obvious, defective condition, which was liable to burst at any time, and if you find that he, therefore, assumed the risk, and if you find that no reasonably prudent man would have continued to run it in that condition, but that he would have shut off

the water glass and run the engine without it, then he assumed the risk that was incident thereto.

The plaintiff on the other hand says that you should not so find. That even should you find that the guard glass was gone, that this water glass did not burst with any degree of frequency, that any reasonable man under the existing circumstances of the situation would have gone and used it; that it was only a few years ago when they were using engines all over the country without this guard glass, and that there was no known visible danger, but that he could not have appreciated that it was liable to break and that he did report it as soon as he had an opportunity upon his next trip to the round house foreman and was given a promise of repair, and relying upon this promise, the danger not being so obvious that a man of ordinary prudence would not have done it, he continued to run it with the promise of repair, and that an ordinarily prudent engineer would have gone like he did, and that he is not guilty of contributory negligence or assumption of risk, but that the condition was brought about by the negligence of the defendant, 190 and that an ordinarily prudent man would have come to the conclusion under the existing circumstances of the situation that it would not be liable to produce injury to him during the time he was asked to run the engine, while in this condition, under promise of repair.

(The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 67.

Bear in mind the definition of risk I have read to you, and say under the circumstances whether he assumed it. A man can assume a risk that is normally incident to his employment; he can assume a risk under certain circumstances, and when I say he assumed a risk, I tell you to bear in mind the definition I have given you.

(The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the preponderance of evidence, you will answer the issue Yes, and unless they have so satisfied you, you will answer it No.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 68.

If you answer the second issue Yes, you need not answer the others, but if you answer it No, then you will go to the next issues.

The defendant contends that the plaintiff, that is, Mr. Horton, should have cut off the water glass, cut it out or shut it off, and used the gauge cocks, which the defendant contends is a perfectly safe and prudent way to do it.

The plaintiff contends that an ordinarily prudent man would have run like he did, and that an ordinarily prudent man would have done as he did, and that there is no negligence attributable

191 to his conduct, but his conduct was that of an ordinarily prudent man, but the defendant contending that it is the conduct of a careless man, and that a man who has no regard for his safety.

If you answer the first issue Yes, of course then you consider the others, but if you answer it No, that ends the case.

One more instruction on contributory negligence which I have been requested to give.

If you answer the first issue Yes and the second issue No, and if you find by the greater weight of evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff was guilty of contributory negligence and you will answer the third issue Yes.

Now that brings us to the consideration of the fourth issue, What damages, if any, is the plaintiff entitled to recover?

This case, on account of the Federal Statute, in a measure changes the ordinary manner of ascertaining damages, because in the statute itself this language is used. I mean in the statute under which this action is brought this language is used:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee, the plaintiff, may have been guilty of contributory negligence shall not bar a recovery—bar means entirely defeat recovery—but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

So your estimate of damages are to be controlled to some extent, depending in extent upon the amount of negligence attributable to the employee as to how you answer the third issue.

192 If you answer the third issue No, that he did not contribute to his injury, the measure of damages is as follows:

(The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's negligent act, and this may embrace indemnity for actual expense incurred, in nursing, medical attention, loss of time, loss of ability to perform mental or physical labor, or capacity to earn money, and actual suffering of body or mind which are the immediate and necessary consequences of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. That is the rule.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 69.

If you find that he was guilty of contributory negligence, the same rule applies, except that you should diminish that amount in proportion as you find negligence attributable to the plaintiff.

I will use the exact language of the statute: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," Mr. Horton, the plaintiff in this instance.

That is the rule, if he is guilty of contributory negligence, then you shall diminish that amount in proportion to the amount
193 of negligence you attribute to the employee. Of course, if you find no negligence, you do not diminish it, but if you do find contributory negligence, you do diminish it in that proportion which I have just explained to you.

Again, the fact that I charge you upon the question of damages does not mean that I think the plaintiff ought to have a cent, or any specific amount, or the whole amount. If I intimated to you any opinion about it, it would be wrong, and either side would object, but, gentlemen, you are to try the fact, and I want to say to you again that nothing I have said to you will have any effect as to whether any fact has or has not been established.

Upon the question of damages, the plaintiff contends that prior to this time he was reasonably making from \$165 to \$190 a month, and that by reason of this injury he suffered intensely for a great many weeks, and that he was compelled to remain idle, and even then when he could get employment he could only earn about \$17 a week, and later up to \$20, and now up to \$25 a week, and that now, as he contends on account of the condition left by this injury he is not now able to perform the duties of an engineer, and that he can not secure employment in the occupation of a locomotive engineer, and the position he has is not near so remunerative, and by reason of all of these facts and circumstances, and on account of the fact that he has been forced to remain idle, and has suffered pain and inconvenience, which is the direct result of this injury, he is entitled to a large amount of damages. The amount fixed in the complaint is \$50,000, the amount in evidence not being fixed at any particular sum. It is not necessary for me to fix it, gentlemen, as that is a matter entirely for you.

The defendant, on the other hand, on the question of damages, says that the damages if any are slight, and that they have shown you prior to this injury, in 1905, he had in his eye at that time the particular injury from which he is suffering now, and that they
194 are not responsible for it, and that the defect to his vision is due to that injury and not any injury which happened in 1910, and that they have shown this to you by Dr. Battle, who made an examination at that time, and that they are not liable, if at all, except for the temporary injury which healed of itself in a week or ten days. And the defendant further contends that if you find all of these issues against them, that they are only liable for this temporary injury, and that it would be a small amount of money.

So, gentlemen, in this particular case it becomes important for you to determine by the greater weight of the evidence. The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the injury he is now suffering from was due to this particular alleged negligence at that particular time in 1910. He cannot recover for any defect of vision or injury that he has or had, or which he is suffering from now, which he had prior to that time.

If you find that the defect in his vision, if you find that there is a defect, is due to that scar, and you further find that there was this scar there back in 1905, from the evidence, and that his defect in vision is due to that, you can not allow him one cent for that in this case.

All you can allow for is such damages as followed from the negligent act of the defendant, at the time alleged in 1910, if you do find that the defendant was negligent on the 4th day of August. So it becomes important for you to determine that.

The burden is on the plaintiff when you get to estimating damages. The fact that—but I have charged you as to that. On this question of damages, the plaintiff asserts on the one hand that his vision was all right in 1910, and that he had no defect, and that his eye sight was sufficient to run an engine, and that he was given an engine, and that he did run it for years and years, and that now he cannot do it.

It is contended by the defendant that he has exactly the same vision now that he had when he was running that engine, and that by his own statement on cross-examination he has said to you that he could run an engine just as well now and as good as anybody in the country if he could get employment.

The defendant claims that he meant mechanically he could, but on account of the defect in his vision he cannot get employment.

The burden is upon the plaintiff to show you by the greater weight of the evidence that he was injured and that the injury was the result of the particular act complained of. If there is any defect in his vision which was caused by anything prior to the 4th of August, 1910, or caused by anything except the particular act complained of, the plaintiff cannot recover.

Now, gentlemen, I do not know of any more important position or higher duty than when a jury is called upon to assess damages. It is a difficult proposition.

After all, gentlemen, it is what you say from the evidence, in your good common sense and judgment based upon the evidence, what sum will compensate the plaintiff for the injury which he has received as a direct result of the negligence of the defendant and not from any other source. Nothing should be given because it is a railroad and nothing should be deducted because it is a railroad. It should be treated as if one individual was liable to another individual.

Nothing shall be given because the plaintiff has not succeeded in getting employment with the Seaboard since the injury. You cannot take that into consideration. You may consider that fact in

passing upon the question as to the extent of his damages, whether or not he can now run an engine, but a railroad company has the right at any time to employ or dismiss its employees without being liable in this case to any of them, and without giving reasons, and that fact shall not affect you in arriving at the damages.

As I said to you, I do not know of any higher duty you are called upon to perform than in assessing damages, because it is
196 what sum you say in your good, common sense, based upon the evidence, is a fair, just, honest, full compensation for the injury which the plaintiff received as a direct result of the negligence of the defendant, not one cent more or one cent less. When you get to that issue, if you get to it, you will answer that issue in dollars and cents.

Now, gentlemen, the plaintiff alleges that he was injured by the negligent act of the defendant on August 4, 1910. Of course, he could not recover for any injury received prior to that time, I mean any injury to his eye, in this particular case, but he can only recover for the injury received which was directly caused by the negligent act of this defendant. He could recover for that.

To make it plain. If when I was a child I took an axe and cut off this finger, or cut off half of this finger, or two-thirds of this finger, and later the railroad company, through its negligent act, cut off the other third, I could recover damages on account of this one-third, but I could not recover for the two-thirds heretofore cut off. I am not using these fingers to illustrate to you or to intimate to you or to influence you in arriving at your verdict. I am just illustrating if there was an additional injury, I can recover for that injury, but I can not recover for any injury which already existed.

I have read to you a definition of negligence, expense and nursing. There is no evidence of expense and nursing, I believe, except his \$10.65 doctor's bill. That is the general rule I have laid down. Of course, if there is no evidence to fit the particular thing, you will not consider it, but if there is evidence, of course, you will apply it.

Take the case, gentlemen, and say what you find.

I will repeat, if you answer the first issue No, that ends the case and you will return your verdict, but if you answer the first issue "Yes," then you will go to the second issue. If you answer the first issue "Yes" and the second issue "Yes," then you return your
197 verdict, but if you answer the first issue "Yes" and the second issue "No," then you proceed to answer the third and fourth issues.

Take the case, gentlemen.

The jury for their verdict answered the issues as follows:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

Answer: "Yes."

2. If so, did plaintiff assume the risk of injury?

Answer: "No."

3. Did plaintiff by his own negligence contribute to his injury?

Answer: No.

4. What damages, if any, is plaintiff entitled to recover?

Answer: \$4,500.

Upon the coming in of the verdict the defendant moved for judgment non obstante veredicto. Motion overruled and defendant excepts. Exception No. 70.

The defendant moves to set the verdict aside because the amount of damages awarded is excessive. Motion overruled and defendant excepts. Exception No. 71.

The defendant moves to set the verdict aside as against the weight of the evidence. Motion overruled and defendant excepts. Exception No. 72.

The defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, in overruling defendant's motion for judgment of nonsuit and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction. Motion overruled and defendant excepts. Exception No. 73.

The Court signed judgment as appears in the record.

To the judgment signed by the Court, defendant excepts. Exception No. 74.

The defendant in open court appeals to the Supreme Court. Notice of appeal given in open court and further notice waived. Undertaking on appeal fixed at \$50.

198 By consent defendant is allowed 60 days to file and serve statement of case on appeal and plaintiff is allowed 60 days thereafter to serve counter-statement or exception.

At the term of court at which this action was tried and judgment signed therein, the defendant, Seaboard Air Line Railway, filed a motion for a new trial for newly discovered evidence, as follows:

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1914.

(Title of Cause.)

Motion for New Trial for Newly Discovered Evidence.

To the Honorable H. W. Whedbee, Judge Superior Court:

The petition and motion of the defendant in the above entitled cause respectfully shows:

1. That the plaintiff in this action brought suit for the recovery of damages for injury to his right eye alleged to have been caused by the explosion of water glass, while employed on defendant's railroad as engineer.

2. That defendant denied that the injury complained of was due to the explosion of said water glass and set up as a defense that plaintiff's eye was injured prior to the time alleged in the complaint, and that the defective vision of plaintiff is due to the scar left there by an old injury.

3. That defendant offered evidence of Dr. Battle, who testified that he examined plaintiff's eyes in 1905, nearly five years before the alleged injury, and found the vision in plaintiff's right eye, which he alleges was injured, to be 20-70, which is the condition of vision in said eye, found to exist by Dr. Horton, who examined plaintiff's eyes in 1912, after the date of the alleged injury.

4. That the plaintiff testified and offered evidence of Dr. Goodwin to prove that his eyesight in his right eye was normal prior to date of the alleged injury and that he had never received an injury to the said eye prior to that time, and the plaintiff vigorously denied that the said eye had ever been injured except at the time alleged.

5. That the jury found the issues in favor of plaintiff and awarded him \$4,500.

6. That the defendant had no evidence that the plaintiff's eye had been injured by being struck with a knife in the hands of one of his brothers when he was a boy, and had been unable after having exercised due diligence to secure such evidence.

7. That after the trial of the action and during this term of Court, the defendant was appraised for the first time of the fact that the plaintiff's eye had been injured when he was a boy by a knife striking him in the eye, and the defendant received information through its counsel that C. E. Barrow had stated that he remembered the time the plaintiff received the said injury to his eye; that he knew the said eye had been in a damaged condition since that time, and that the said injury was due to plaintiff's eye being struck by a knife in the hands of one of his brothers.

8. That thereupon one of defendant's counsel consulted said C. E. Barrow about the matter, and he stated to defendant's counsel the facts in this connection which appear in an affidavit attached hereto.

9. That the said C. E. Barrow if sworn to testify in this case, as he will be subpoenaed to do so, he will testify to the facts as set forth in said affidavit of defendant's counsel, Murray Allen.

10. That the said evidence is probably true.

11. That the said evidence is competent, material and relevant.

12. That the defendant had no knowledge of the existence of this testimony prior to the trial or during the trial of this action, and did not secure such information until after judgment had been rendered.

13. That the said evidence is not merely cumulative.

200 14. That the said evidence does not tend only to contradict a former witness or to impeach or discredit him.

15. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will probably prevail.

16. That after making the statements as set forth in the affidavit of Murray Allen, the said C. E. Barrow stated that the facts were true and that he would make an affidavit, setting forth said facts, although he would not like to do so on account of his relations with James T. Horton, but subsequently and on the same day the said C. E. Barrow said that he would not make an affidavit, but he did not deny the truth of the statement.

Wherefore, your petitioner prays that the verdict and judgment in this case be set aside and a new trial awarded in order that the defendant may have an opportunity to present the said newly-discovered evidence to the jury, and the defendant prays that the Court may have the said C. E. Barrow brought before the Court and examined upon oath as to the facts set forth in the affidavit of Murray Allen.

(Signed)

WINSTON & BIGGS,
MURRAY ALLEN,
Attorneys for S. A. L. R'y.

L. M. Calvert being duly sworn says that he is agent for the defendant, Seaboard Air Line Railway at Raleigh, N. C.; that he has read the foregoing petition and that the facts set forth in said petition are true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

(Signed)

L. M. CALVERT.

Subscribed and sworn to before me this 8th day of October, 1914.
(Signed) C. A. GOSNEY, [SEAL.]
Notary Public.

My commission expires 29th day of January, 1914.

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Affidavit.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

Murray Allen, being duly sworn, says that he is attorney for the defendant, Seaboard Air Line Railway in above action, which was tried at September Term, 1914, of Wake Superior Court; that after judgment was rendered against the defendant in said action, affiant was informed that C. E. Barrow had stated that he remembered that James T. Horton received an injury to his eye when he was a boy and that the said injury was caused by a knife in the hands of one of his brothers, striking the said Horton in the eye while they were playing; that this was the first information that had reached affiant as to the existence of this witness or as to the facts which he had stated, and affiant had never received information that the said Horton had received an injury to his eye in the manner stated; that affiant talked with said C. E. Barrow, after receiving this information, and that said Barrow made a statement to affiant as follows:

That he the said Barrow married the sister of James T. Horton's mother and lived within about three miles of the Horton's home near Youngsville, N. C., twenty-five or thirty years ago; that he

remembers distinctly that the said Horton's eye was injured when he was a boy; that the said eye had been injured ever since that time; that he saw his injured eye at the time and that it is the same eye he now claims to have been injured by the railroad; that he was told by Horton at the time that his eye was hurt by a knife striking it; that the knife was in the hands of one of his brothers and struck him in the eye while they were tusseling; that he would not like to have anything to do with Horton's suit because they did not speak to each other, and because of his connection with the family,

202 but that the statement he had made was true and he could so testify, if called upon to do so and that he would make an affidavit to that effect.

That subsequently the said Barrow called affiant on the telephone and said he would not make the affidavit, that he preferred not to have anything to do with the case. Affiant further says that the said C. E. Barrow will, if subpoenaed as a witness, give the evidence as contained in his statement to affiant; that it is probably true; that it is competent, material and relevant; that there has been no laches and that the defendant used due diligence to procure this testimony prior to the trial of this action; that the evidence is not merely cumulative; that it does not tend only to contradict a former witness, or to impeach or discredit him; and that this evidence is of such a nature that on another trial a different result will probably be reached and that the right will prevail.

(Signed)

MURRAY ALLEN.

Sworn to and subscribed before me this 8th day of October, 1914.

(Signed)

C. A. GOSNEY, [SEAL.]
Notary Public.

My commission expires 29th day of January, 1916.

Upon consideration of the foregoing motion and affidavit, the Court enters the following order.

Order.

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1914.

(Title of Cause.)

This cause coming on to be heard at this term, upon the motion, supported by affidavit to set aside the verdict and judgment entered at this term on the ground of newly discovered evidence and the same being considered and the Court being of opinion

203 that the proposed newly discovered evidence if true is merely cumulative, it is now ordered and adjudged by the Court that the said motion be and is hereby denied.

(Signed)

H. W. WHEDBEE,
Presiding Judge.

To this order defendant excepts.
(Signed)

H. W. WHEDBEE,
Presiding Judge.

This is Exception No. 75.

Exceptions Grouped and Assignments of Error.

NORTH CAROLINA,
Wake County:

(Title of Cause.)

The defendant, Seaboard Air Line Railway, appellant, groups its exceptions and assigns error as follows:

1. For that the court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

"I told Powie Matthews that the guard glass was gone, and asked if he had any of them. He was the day roundhouse foreman and he said no, they did not have any here."

This is defendant's Exception No. 1.

2. For that the Court permitted plaintiff, J. T. Horton, over defendant's objection and exception to testify that defendant's roundhouse foreman told him, "No, they did not have any (guard glasses) here (in Raleigh)."

This is defendant's Exception No. 2.

3. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. What did you say to Powhatan Matthews?

Objection by defendant.

204 *By the Court:*

To any statement as to the water glass, the defendant objects. Objection overruled. Defendant excepts.

This is defendant's Exception No. 3.

4. For that the Court admitted the following testimony of the plaintiff, J. T. Horton, over defendant's objection and exception.

Q. State to the jury why you ran that engine out on the second trip without the guard glass in, Mr. Horton.

A. Because I was promised I would have a guard glass when I returned, Mr. Matthews told me, and I was told to run her and I had to do it.

This is defendant's Exception No. 4.

5. For that the Court referring to the answer *that* the foregoing question, made the following statement and admitted testimony of plaintiff, J. T. Horton, as follows:

By the Court: Strike out what he was promised by Matthews, that part of it is stricken out, as that was a conclusion. You can say I ran it because of the conversation I had with Matthews.

A. That is right.

By the Court: All of the answer is stricken out and I will per-

mit him to say I ran it on account of the conversation with Matthews.

Objection by defendant. Objection overruled. Defendant excepts.

This is defendant's Exception No. 5.

6. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. I will ask you this question: State to the jury whether you in your present condition in respect to the sight of your right eye are able or capable to operate a locomotive engine?

A. No.

This is defendant's Exception No. 6.

205 7. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Why?

A. On account of the condition of my right eye, impaired eye sight.

This is defendant's Exception No. 7.

8. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. What reply did they make to you, if any?

Objection by defendant.

By the Court: It is not a question of the reply, but whether he could secure employment.

By Mr. Douglass: State, Mr. Horton, if you failed to get employment with the Seaboard Air Line Railway on account of the condition of your eye sight.

Objection by defendant. Objection overruled. Exception.

A. Yes.

This is defendant's Exception No. 8.

9. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. You said something about handing in a large list of repairs to be done to the engine on the day before this injury to your eye?

A. Yes.

Q. Did they do the work?

A. Not a bit of it. I believe they did open the sand pipes.

This is defendant's Exception No. 9.

10. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Was it your duty under the rules of this company to put the missing gauge glass on that work report?

A. All that is necessary is to get a requisition and put it in.

This is defendant's Exception No. 10.

206 11. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Was that a repair withing the rule requiring it to be in writing?

A. No, it is a supply.

This is defendant's Exception No. 11.

12. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Is there any rule requiring a written report for a supply?

A. No.

This is defendant's Exception No. 12.

13. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass?

Objection by the defendant. Objection sustained for the reason that this has been over on both the direct and cross examinations.

By Mr. Simms: Does your Honor understand that it is in the record that it is more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the Court: Yes, he said that, because they would stop up.

This is defendant's Exception No. 13.

14. For that the Court admitted the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

207 Q. The Court says you may explain why you told Mr. Burrus you did not report that guard glass for reasons best known to yourself.

A. He asked me why I did not put it on my work report and the reason was because I had been to some one higher than him and he said he did not have any. Mr. Matthews was higher than—over Mr. Burrus.

This is defendant's Exception No. 14.

15. For that the Court refused to strike out the foregoing evidence upon defendant's motion.

This is defendant's Exception No. 15.

16. For that the Court permitted the plaintiff, James T. Horton, to be recalled and testify as follows:

Q. State to the jury what you meant in your cross examination by saying that you could run an engine as good as you ever could?

A. I meant I knew as much about an engine mechanically as I ever did, but I could not see to run it.

This is defendant's Exception No. 16.

17. For that the Court admitted the following testimony by plaintiff's witness, Dr. W. C. Horton, over defendant's objection and exception:

Q. When he went up there for examination, he told you how his eye got hurt?

A. I think he did. I don't remember what he said, but it seems to me it was an explosion of some kind—I am not sure about that.

This is defendant's Exception No. 17.

18. For that the Court admitted the following testimony by J. A. Massey, a witness for the plaintiff, over the defendant's objection and exception:

I think I know what the custom and practice was when supplies were needed by engineers on their engines.

Q. What was it?

A. The man in the store room furnished the supplies upon requisition. The requisition was brought to him, and it had
208 either to be signed by the Master Mechanic, General Foreman or the Foreman.

This is defendant's Exception No. 18.

19. For that the Court overruled defendant's motion for judgment of nonsuit at the conclusion of plaintiff's evidence.

This is defendant's Exception No. 19.

20. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, Powhatan Matthews:

Q. How would that have been supplied if there was no guard glass in stock?

This is defendant's Exception No. 20.

21. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, Powhatan Matthews:

What could have been done?

This is defendant's Exception No. 21.

22. For that the Court, over defendant's objection and exception, excluded the following — asked defendant's witness, Powhatan Matthews:

Q. Are the water gauge and water cocks part of the engine that should be inspected by the engineer?

This is defendant's Exception No. 22.

23. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, Powhatan Matthews:

Q. Did you ever tell Mr. Horton to run his engine like she was and you would send to Portsmouth and get a guard glass for the Buckner gauge?

A. I don't remember telling him that.

2. Would you not know whether you told him that or not?

This is defendant's Exception No. 23.

24. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, D. K.

Wright:
209 Q. Did you ever operate an engine that had no gauge glass on it?

This is defendant's Exception No. 24.

25. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, D. K. Wright:

Q. If anything should happen to the gauge glass, what is the duty of the engineer?

This is defendant's Exception No. 25.

26. For that the Court, over defendant's objection and exception,

excluded the following question asked defendant's witness, W. S. Burrus:

Q. If an engineer is employed or discharged by the Seaboard, what officer has control of it?

This is defendant's Exception No. 26.

27. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, W. S. Burrus:

Q. Would the notice of the dismissal of an engineer come through your office?

This is defendant's Exception No. 27.

28. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, W. S. Burrus:

Q. Had Mr. Horton's employment as an engineer ceased?

This is defendant's Exception No. 28.

29. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, W. S. Burrus:

Q. When did you request Mr. Horton to return his pass and other property of the Seaboard Air Line Railway, if you did?

By the Court: You want to show a certain date?

By Mr. Allen: The defendant proposed to prove by this witness that he did not take up the plaintiff's annual pass, issued to
210 him as engineer, and the other property belonging to the railroad company, until after suit was brought by the plaintiff against the Seaboard Air Line Railway.

This is defendant's Exception No. 29.

30. For that the Court, over defendant's objection and exception, excluded the following question asked defendant's witness, W. S. Burrus:

Q. When an engineer ceases to be connected with the Seaboard Air Line Railway, is he required to turn over his pass and the other property of the railroad to the railroad?

This is defendant's Exception No. 30.

31. For that the Court, over the defendant's objection and exception, admitted the following testimony of plaintiff's witness, Dr. A. W. Goodwin:

Q. If the jury should find from the evidence that Mr. Horton has only 20-70 sight in one eye and normal in the other, would he in your opinion be suitable for a railroad engineer's duties?

By the Court: In the first place, the question is whether the doctor has any opinion. Have you an opinion satisfactory to yourself about it?

A. Well, I would think in a deformity in the eye—I would imagine that was a deformity more than a disease, that is simply an opinion—I would think in a deformity in the eye would (any deformity) unfit him for the engineer's service and in testing I did not find any. I would not like to express an opinion, but from a general medical standpoint, I am not an eye specialist, I would think he was unfit.

This is defendant's Exception No. 31.

32. For that the Court excluded the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. I understand from you whatever Mr. Benton or Mr. Burrus or Mr. Hopkins or Mr. Matthews testified to differently from your recollection is not true?

This is defendant's Exception No. 32.

211 33. For that the Court excluded the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. You say that what Mr. Hopkins said contrary to what you said is not true?

This is defendant's Exception No. 33.

34. For that the Court excluded the following question asked the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. Didn't I understand you to say what Mr. Hopkins said was not true?

By the Court: I do not think that is the way to examine a witness. I think you may direct his attention to any particular thing and ask if that happened.

This is defendant's Exception No. 34.

35. For that the Court refused upon motion of the defendant, to strike out the following evidence of plaintiff's witness, Ernest Horton, overruled defendant's objection and exception.

Q. What would be the proper thing to do, or would it be the proper thing in the event there was no guard glass on the water gauge to shut off the water glass and run the engine with the gauge cocks?

A. I ran an engine over there for four years and I never shut the glass off.

This is defendant's Exception No. 35.

36. For that the Court overruled defendant's motion for judgment of nonsuit at the conclusion of all the evidence.

This is defendant's Exception No. 36.

37. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

1. The Court charges you that if you believe the evidence, the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue, No.

This is defendant's Exception No. 37.

212 38. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

2. The Court charges you that if you believe the evidence, the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue, Yes.

This is defendant's Exception No. 38.

39. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

3. If you do not answer the second issue, Yes, then the Court charges you that if you believe the evidence, the plaintiff by his own negligence contributed to his injury, and you will answer the third issue, Yes.

This is defendant's Exception No. 39.

40. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

5. The Court instructs you that upon all the evidence in this case the absence of the guard glass and the risk incident to the use of the water gauge in that condition were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, and if plaintiff reported the absence of the guard glass to defendant's foreman and the foreman gave him a promise to repair, a reasonable time for the performance of such promise had expired, and plaintiff assumed the risk of injury and you will answer the second issue, Yes.

This is defendant's Exception 40.

41. For that the Court, over defendant's objection and exception refused to instruct the jury as follows, as requested by the defendant:

6. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, the danger was so imminent that no ordinarily prudent man, under the circumstances would have relied upon such promise, and plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

This is defendant's Exception No. 41.

42. For that the Court, over defendant's objection and exception refused to instruct the jury as follows, as requested by the defendant:

7. The Court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, there is no evidence that he was induced by such promise to continue to use the engine with the water gauge in a defective condition, and you will answer the second issue, Yes.

This is defendant's Exception No. 42.

43. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

8. The Court instructs you that the absence of the guard glass and the risk incident thereto were so obvious that an ordinarily prudent person would have observed and appreciated them, and you will answer the second issue, Yes, unless plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair.

This is defendant's Exception No. 43.

44. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

9. If you find that the plaintiff reported the absence of the guard glass and was given a promise of repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the Court instructs you to answer the second issue as to assumption of risk, Yes.

This is defendant's Exception No. 44.

45. For that the Court, over defendant's objection and exception, modified defendant's request for instruction No. 11, by adding at the end thereof, "That is, relying on that promise, he continued to use the engine," as follows:

11. If you find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass without guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue, Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair, and that he was induced by such promise to continue in the employment.

The Court modified the instruction by adding at the end thereof: "That is, relying on that promise, he continued to use the engine."

This is defendant's Exception No. 45.

46. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by defendant:

13. If you answer the first issue Yes, then the Court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's roundhouse foreman that the guard glass was gone and was given a promise of repair, the time reasonably required for the performance had expired at the time of the explosion of the water glass and you will answer the second issue, Yes.

This is defendant's Exception No. 46.

47. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

18. If you answer the first issue Yes, and if you find by the greater weight of the evidence that the plaintiff appreciated the danger incident to the use of the water glass without the guard glass and that he could have shut off the glass, and operated his engine with
215 safety by using the gauge cocks on his engine and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the Court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

This is defendant's Exception No. 47.

48. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

20. The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the greater weight of the evidence, you will answer the first issue, No.

This is defendant's Exception No. 48.

49. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

21. If you find from the evidence that the engine could have been operated in safety by cutting off the water glass and using the gauge cocks, and that the plaintiff continued to use the water glass when he knew there was no guard glass on it and that it was dangerous to use the water glass in that condition, you will answer the first issue, No.

This is defendant's Exception No. 49.

50. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

22. If you find from the evidence that the plaintiff could have

performed his duties in operating the engine by using the gauge cocks for the purpose of telling how much water was in the boiler, and he continued to use the water glass without the guard glass, you will answer the first issue, No.

This is Defendant's Exception No. 50.

51. For that the Court, over defendant's objection and exception, instructed the jury as follows:

They, as I understand the decision, and as I charge you the decision is, hold it is not the duty of the railroad company, not an absolute duty that the railroad company owes to a servant to furnish an absolutely safe place, or absolutely safe and secure tools and appliances and equipment with which to do his work, but that the rule is that the railroad company shall exercise ordinary care and prudence to the end that—I want to use the exact language—to the end that the tools and the appliances of the work may be safe for the workmen. The Supreme Court of the United States says that the common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman.

It is the duty of the employer to exercise due care in respect to providing a safe place of work, and suitable and safe appliances for the work.

This is Defendant's Exception No. 51.

52. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

Negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what a reasonable and prudent man under the existing circumstances would not have done. That is negligence.

This is Defendant's Exception No. 52.

53. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exertion of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequence would likely be produced thereby.

This is Defendant's Exception No. 53.

54. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

The law is, that if the act is one which the party ought in the exer-

cise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not anticipate the particular injury that did happen. Consequences which flow in unbroken sequence, without an intervening cause from the original negligent act are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular result which did follow.

This is Defendant's Exception No. 54.

55. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and second that it did actually produce it.

This is Defendant's Exception No. 55.

56. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

If you find from the evidence that the guard glass was in its proper place on the engine when the plaintiff started on his run on the morning of July 27, 1910, and that the defendant had no knowledge of the absence of such a glass, and it was the plaintiff's duty to make
a note of the absence of the glass in writing on his work re-
218 port, and he failed to do so, and you further find that the defendant's failure to have knowledge of the absence of the guard glass was due solely to the plaintiff's failure to make the report in writing of the absence of the guard glass, the Court instructs you that there has been no negligence on the part of the defendant, and you will answer the first issue, No.

This is defendant's Exception No. 56.

57. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing — the *the* injury as a proximate cause thereof, without which the injury would not have occurred.

This is defendant's Exception No. 57.

58. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

Contributory negligence arises when the plaintiff as well as defendant has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury.

This is defendant's Exception No. 58.

59. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

The Supreme Court in passing upon this particular case says, and it is the law so far as this case is concerned:

The distinction between contributory negligence and assumption of risk is simple. Contributory negligence involves the notion of some

fault or breach of duty on the part of some employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as failure to use such care for his safety as an ordinarily prudent employee under similar circumstances would use.

On the other hand, assumption of risk, even though the
219 risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present notwithstanding the exercise of all reasonable care on the part of the employee.

This is defendant's Exception No. 59.

60. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not.

This is defendant's Exception No. 60.

61. For that the Court over the objection and exception of the defendant, instructed the jury as follows:

But risks of another sort not naturally incident to the occupation, may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work.

These risks, the latter risks, the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

This is defendant's Exception No. 61.

62. For that the Court over the objection and exception of the defendant instructed the jury as follows:

When an employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or his representative an assurance that the defect will be remedied,
220 the employee assumes the risk, even though it arises out of the master's breach of duty.

This is defendant's Exception No. 62.

63. For that the Court over the objection and exception of the defendant instructed the jury as follows:

If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.

This is defendant's Exception No. 63.

64. For that the Court over the objection and exception of the defendant instructed the jury as follows:

The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defendant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk.

This is defendant's Exception No. 64.

65. For that the Court over defendant's objection and exception modified the following request of defendant for special instruction, by adding at the end thereof, the following words, that is, relying on that promise he continued to use that engine.

If you find by a preponderance of the evidence that the plaintiff appreciated the risk incident to the use of the gauge glass without the guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair and that he was induced by such promise to continue in the employment. That is, relying on that promise he continued to use that engine.

This is defendant's Exception No. 65.

221 65½. For that the Court, over defendant's objection and exception, instructed the jury as follows:

"If you answer the first issue 'Yes,' then the Court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's round house foreman that the guard glass was gone and was given a promise of repair, yet you should find that the time reasonably required for the performance of this promise had expired at the time of the explosion of the water glass, you will answer the second issue 'Yes.' "

This is defendant's Exception No. 65½.

66. For that the Court over defendant's objection and exception instructed the jury as follows:

If you answer the second issue Yes, that he assumed the risk incident to his injury, the burden being upon the defendant to satisfy you of that by the greater weight of the evidence, you need not answer the third and fourth issues.

This is defendant's Exception No. 66.

67. For that the Court over defendant's objection and exception, instructed the jury as follows:

The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury.

This is defendant's Exception No. 67.

68. For that the Court, over defendant's objection and exception, instructed the jury as follows:

The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the pre-

ponderance of the evidence, you will answer the issue Yes, and unless they have so satisfied you, you will answer it No.

This is defendant's Exception No. 68.

69. For that the Court over defendant's objection and exception instructed the jury as follows:

222 The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's negligent act, and this may embrace indemnity for actual expense incurred, in nursing, medical attention, loss of time, loss of money and actual suffering of body or mind, which are the immediate and necessary consequence of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion as that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. That is the rule.

This is defendant's Exception No. 69.

70. For that the Court refused defendant's motion for judgment non obstante veredicto.

This is defendant's Exception No. 70.

71. For that the Court refused defendant's motion to set the verdict aside because the amount awarded is excessive.

This is defendant's exception No. 71.

72. For that the Court refused defendant's motion to set the verdict aside as against the weight of the evidence.

This is defendant's Exception No. 72.

73. For that the Court refused defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of the evidence, in overruling defendant's motion for nonsuit and in the Court's charge to the jury and in the Court's refusal to give defendant's request for instruction.

This is defendant's Exception No. 73.

74. For that the Court signed judgment as appears in the record.

223 This is defendant's Exception No. 74.

75. For that the Court denied the defendant's motion for a new trial for the newly discovered evidence of C. E. Barrow, who would testify that he, the said Barrow, married the sister of James T. Horton's mother, and lived within about three miles of the Horton's home, near Youngsville, N. C., twenty-five or thirty years ago; that he remembers distinctly that the said Horton's eye was injured when he was a boy; that the said eye has been injured ever since the said time; that he saw the injured eye at the time and it is the same eye he now claims to have been injured by the railroad; that he was told by Horton at the time that his eye was hurt by a knife

striking it; that the knife was in the hands of one of his brothers and struck him in the eye while they were tusseling.

This is defendant's Exception No. 75.

MURRAY ALLEN,
Attorney for Defendant.

The foregoing is tendered by the defendant as its statement of case on appeal.

MURRAY ALLEN,
Attorney for Defendant.

Service of the foregoing statement of case on appeal is hereby accepted, copy of same having been received, this 5th day of December, 1914.

DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.

The foregoing is agreed upon as case on appeal to the Supreme Court.

This — day of February, 1915.

DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.
MURRAY ALLEN,
Attorney for Defendant.

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Clerk's Certificate.

I, Millard Mial, Clerk of the Superior Court of Wake County, North Carolina, do certify that the foregoing contains a full, true and correct transcript of the record in an action lately pending in said court between James T. Horton, plaintiff, and Seaboard Air Line Railway, defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Raleigh, this — day of February, 1915.

[SEAL.]

MILLARD MIAL,
Clerk Superior Court.

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Docket Entries.

Appeal docketed March 5, 1915.

Argued April 8, 1915.

Opinion by Clarke, C. J., May 12, 1915, and concurring opinion by Walker, J., and dissenting opinion by Brown, J., May 12, 1915, as follows:

226 North Carolina Supreme Court, Spring Term, 1915.

#257, Wake.

JAMES T. HORTON

v.

SEABOARD AIR LINE RAILWAY.

Appeal by Defendant from Whedbee, J., at September Term, 1914.

Douglass & Douglass, R. N. Simms and W. B. Snow for Plaintiff.
Murray Allen for Defendant.

CLARK, C. J.:

This is an action for personal injuries suffered by the plaintiff, while an engineer in defendant's employment, by the explosion of a water glass on the defendant's locomotive, impairing the sight of the plaintiff's right eye. The case was first here 157 N. C. 146, when a new trial was awarded. It was here again 162 N. C. 424 and upon writ of error, it was then heard in the U. S. Supreme Court 233 U. S. 492, and the writ being sustained the case was remanded to the lower Court where, as we think upon a review of the record, it has been tried strictly in conformity with that opinion of the U. S. Supreme Court.

The argument of the defendant seeks to put the plaintiff in this predicament, that if the likelihood of injury from an explosion of the glass was not apparent, then the defendant was not guilty of negligence. But, on the other hand, if such defect was apparent then the plaintiff assumed the risk and is equally barred from recovering damages.

But that was not the ruling of the U. S. Supreme Court, as we understand it. That Court held "When the employee knows of a defect in the appliances used by him and appreciates the resulting danger and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk even tho' it may arise from the employer's breach of duty. But where there is promise of reparation by the employer, the continuing on duty by the employee does not amount to assumption of risk, unless the danger be so imminent that no ordinarily prudent man would rely on such promise."

The plaintiff testified that he notified the proper official that the guard glass was gone and asked for one, and the reply was that the road did not have any in stock but had them in Portsmouth and the company would send there and get one, and said that the plaintiff would "have to run the engine like she was."

There was evidence, from which the jury could find that while the absence of the guard glass was a defect causing danger to the plaintiff, and which amounted to negligence on the part of the defendant, yet it was not such an imminent danger as would justify excusing the defendant, if the plaintiff remained

on service after reporting the defect and receiving assurance that it would be repaired. The Court properly told the jury that "risks not naturally incident to the occupation may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These latter risks, the employee is not treated as assuming until he becomes aware of the defect or disrepair or of the risk arising from it unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstance would have observed and appreciated them."

The Court further charged "When an employee does know of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or representative the assurance that the defect will be remedied, the employee assumes the risk, even tho' it arises out of the master's breach of duty. If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance or until the particular time specified in such performance, the employee relying upon the promise does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man would rely upon such promise."

The defendant excepted to the above instructions but we think it is strictly in accordance with the decision of the U. S. Supreme Court in this case, and that upon the evidence the jury were authorized to find, as they did in response to the second issue, that the plaintiff did not assume the risk of injury.

There are numerous other exceptions but this case has been so fully considered in every aspect of the law and the facts have been so fully set forth on the two former appeals in this Court and also upon consideration of the writ of error in the U. S. Supreme Court that it would be work of supererogation to go over the same ground a fourth time.

The very careful and learned Judge who tried this case below seems to have fully comprehended and to have closely and carefully followed the decision of the U. S. Supreme Court upon the points on which that Court gave a new trial, and we find no error in his rulings.

The only other exception that we need refer to is the refusal by the Court below of the motion for a new trial for newly discovered testimony. Such refusal was discretionary with the Court, and is not reviewable here. It is true the Judge stated that the newly discovered testimony, if true was merely cumulative. But that does not justify us in reversing his judgment denying the motion for a new trial.

The defendant's cause has been very fully and ably presented but we find nothing that would justify us in setting aside the verdict and judgment. The Court and jury had the benefit of all the light that could be shed upon this controversy, from every angle, by this Court and the U. S. Supreme Court and seem to have faithfully followed the views of the Court of highest resort where it differed from

the views of this Court, and in other respects to have followed the well settled decisions of this tribunal.

No Error.

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#257, Wake.

HORTON
v.
RAILWAY Co.

WALKER, J. (concurring):

The facts, as now presented, are not materially different from those before us on the former appeal. There was then a motion to nonsuit, which was passed by the Supreme Court of the United States without comment. It was hardly necessary to order a new trial for error in the charge, if, upon the whole case, the plaintiff was not entitled to recover by reason of the assumption of risk. It is, therefore, to be fairly, if not necessarily inferred, from the refusal to nonsuit, that there was, at least, some phase of the evidence that carried the case to the jury. The motion to nonsuit was entitled to first consideration, as if decided favorably to the defendant (plaintiff in error) it fully and finally disposed of the case, and the other questions raised by the assignments of error would, therefore, have become immaterial. But if this were not so, the motion should not now be allowed. It is true that the water guage was "liable to explode," but an explosion was not so imminent as to require that Horton should quit the service of defendant, when he had been promised that the glass guage would be repaired. A prudent man would probably take such a risk, and it was for the jury to say whether he would. He did not continue his work for any unreasonable length of time, but only for a very short time, and the question of assumption of risk or contributory negligence was eminently a proper one for the jury. Nor can it be said that plaintiff's failure to use the three guage cocks on the head of the boiler, was negligence, as matter of law. He testified that they could be used and sometimes were used for the purpose of guaging the quantity of water in the boiler or to ascertain its level, but that they are not altogether reliable or accurate, for he said that they would guage somewhere near the quantity of water, but will not give the perfect level.

230 He stated that an engine can be run without a water-glass and with guage cocks, if the latter will stay open, but that they are liable to become clogged and are easily stopped up by mud or sediment from the water. To give his language: "Yes, you can operate an engine without a water guage, and with the guage cocks, but not as well. You cannot keep these cocks open. They are liable to stop up, but a water glass has got so much bigger opening here than the guage cock. They are the safest thing at all, as they do not stop up like guage cocks, like all of the guage cocks I have seen." He further stated that the mud could not be blown out, if the guage cocks are packed with it. He said much more in regard to this

feature of the case, but the above references to his testimony are sufficient to demonstrate that the case was one for the jury on the question of assumption of risk or contributory negligence. A motion to nonsuit, or a request for a peremptory instruction to find for the defendant, requires that the evidence should receive the most favorable construction for the plaintiff, and, under our rule, the evidence only that sustains his cause of action should be considered, because the jury might adopt it and reject all the unfavorable testimony. "It is well settled that, on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the Court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony." *Brittain v. Westall*, 135 N. C., 492, citing *Purnell v. Railroad Co.*, 122 N. C. 832; *Hopkins v. Railroad Co.*, 131 N. C. 163. More recent cases, affirming the principle, are *Freeman v. Brown*, 151 N. C. 111; *Morton v. Lumber Co.*, 152 N. C. 54; *Johnston v. Railroad Co.*, 163 N. C. 431; *Lloyd v. Railroad Co.*, 166 N. C. 24; *Trust Co. v.*

231 *Bank*, *Ibid.* 112. The rule of the Federal courts, as to the right of the judge to suggest what the verdict should be, does not apply to a case tried in the State court, even where the cause of action is given by a Federal statute like the Employers' Liability Act. The power to advise the jury as to their verdict, is not equivalent to the right to direct a verdict or to nonsuit, or to dismiss the action. Congress having conferred concurrent jurisdiction on the State courts in such cases, did not undertake, if it had the power to do so, to regulate the procedure and practice in those courts. The plaintiff might elect to sue in the State court, and if he did so elect, it was, of course, intended that the suit should be tried according to the local practice and procedure. *Fleming v. Railroad Co.* 160 N. C., 196. It would be anomalous to try a case in the State court according to a procedure foreign to its jurisdiction. We take it, therefore, that on motion to nonsuit, the evidence with reference to its probative force and its construction, must be considered with due regard to our practice, as it relates to the remedy. *Florida v. Anderson*, 91 U. S. 667. And this is clearly so where there is no rule on the same subject prescribed by Act of Congress creating the right, or where the State rule does not conflict with any such law. *Re Fisk*, 113 U. S. 713. The same is the rule as to evidence, *Ryan v. Windley*, 1 Wall. (U. S.) 66; as to a discontinuance, *Coffee v. Planters Bank*, 13 How. (U. S.) 183; as to what is a material variance, *L. & L. & G. Insurance Co. v. Gunther*, 116 U. S. 113, and, of course, as to the construction of pleadings upon the question of their sufficiency, *Chouteau v. Gibson*, 111 U. S. 200. Many other examples might be stated, which would illustrate to what a great extent the highest Federal court has gone in conforming the practice, pleadings, forms and modes of proceedings, as near as may be, to those of the State courts, both under the federal statutes and under the general rule applicable to such questions. If, therefore,

232 we follow this rule of procedure, the Court cannot, under our decisions, consider the testimony of David Campbell, the defendant's witness, or any other part of the testimony offered in its behalf, when passing upon the motion for a nonsuit, except in so far as such testimony favors, or tends to establish, the plaintiff's right to recover, and this rule applies also to defendant's request for a special instruction to the effect that, if the jury believed the evidence, they should answer the issue as to assumption of risk in the affirmative.

But even if the practice and procedure of the Federal courts is applicable, there is ample evidence, as the record shows, to require the submission of the case to the jury, as it will appear by reading the testimony, that the choice between a safe method of running his engine and a dangerous one, was not left to the plaintiff. Both methods were dangerous. The glass water gauge was safer, in one respect, than the gauge cocks, because it recorded the height of the water in the boiler more accurately and was more likely to prevent an explosion of the boiler, while it presented an element of danger itself because of the absence of the guard glass, and the gauge cocks were dangerous because they did not gauge the quantity of water in the boiler with accuracy, and having a small tube and being of a different construction, they were liable to be stopped up by mud and sediment in the water. The jury only could decide what a man of ordinary prudence would have done in the circumstances. Whether plaintiff reported the defect in the water gauge and was told that it would be repaired, was certainly a question for the jury to decide, in the conflict of testimony. Some extracts from the testimony will, I think, fully sustain these views:

The plaintiff, Jas. T. Horton, testified: "I told Powie Matthews that the guard glass was gone, and asked him if he had any of them. He was the day roundhouse foreman, and he said, No, they did not have any here. I told him the guard glass to the water
233 glass was gone and he said they did not have any and did not keep them in stock and they were in Portsmouth, but he would send to Portsmouth and get one. He said, You will have to run her like she is."

Powatan Matthews testified: "I was asked the question as to whether Mr. Horton reported the absence of that glass, and said, I do not remember, and I do not. That is as far as I go and is as far as I know. I do not remember. I do not deny it."

Edgar W. Barbee testified: "As to the duty of an engineer in respect to obtaining a guard glass or flag or torpedoes, fuses or anything of that nature, or oil cans, from the storeroom, I would tell the foreman I did not have it. It was customary to send the fireman for it. The requisition would come from the foreman. The foreman would send the article to me. I would put it in myself. You would drop it in just like you put a quarter in a slot machine.
* * * Yes, they do pay attention to verbal requests. Yes, you can, that way, send your fireman and get a guard glass if they have them in stock."

J. A. Massey testified: "I had charge of the storeroom. * * *

I know who applied for them (guard-glasses) the engineers did. They would apply to the master mechanic, general foreman or the foreman. The glass in the Buckner Glass was a supply. I did not have any Buckner water guard-glasses in stock down there on August 4, 1910. I did not have any between July 27th and August the 4th. * * * If the engineer wanted a lamp, or flag or a torch or torpedoes or a piece of glass to drop into one of these guards, he would report it to the master mechanic or the general foreman, or the foreman, and ask him for a requisition for whatever article he wanted and bring that requisition to the storeroom and he would get that directly and not through the written report of the engineer for repairs."

This evidence shows that defendant had notice that the
234 guard-glass was missing; that plaintiff had exercised care and diligence in restoring it, and that he had complied with the rules of the company. The plaintiff testified: "I did not say with pressure on that tube in the glass case that the water-glass is liable to explode at any time. No, that is not so. I have run those a year without their exploding. * * * No, I did not know if it did explode without the guard glass that it would be liable to hurt the engineer as I have seen lots of them explode without hurting the engineer. * * * Yes, you can operate an engine without a water guage, with water cocks, but not as well, as you cannot keep these cocks open. They are liable to stop up. But a water glass has got so much bigger opening here than the guage cock. They are the safest things at all, as they do not stop up like the guage cocks, like all of the guage cocks I have seen. * * * I did not attempt to cut it off. I needed it. I did not attempt to run my engine without it."

Strnest Horton, on this point, testified: "It may last a day, a week, a month, or a year and it may last an hour or shorter. * * * Would it be the proper thing, in the event there was no guard glass on the water guage, to shut off the water glass and run the engine with a guage cock? Answer: The proper way, in my opinion, would be to run with the water glass turned on. * * * What is the proper and safe thing to do? Answer: The proper way, in my opinion, would be to run with the water glass turned on. * * * I have not had one (guage glass) to explode with me in the last year to my knowledge. * * * In case it does not leak, I do not shut it off."

Edgar W. Barbee, witness for defendant, testified: "Yes, it is true that engineers on the Seaboard run their engines out with the water glass, without cutting it off, with the guard-glass missing, prior to the time Mr. Horton was injured."

From this and much testimony of the same character, it is apparent that not only one, but many trips might be safely
235 made with a water guage unprotected by a guard glass or shield. A pregnant circumstance, which was in evidence and for the jury's consideration, was the fact that the fireman, W. S. Benton, a witness introduced by the defendant, testified that he knew that the guard glass was broken, that in fact he was the man who

broke it, as he started out on the first trip with the plaintiff, and that he did not call it to his attention, and that he sat directly in front of the water-guage during the entire trip to Aberdeen and the return trip from Aberdeen to Raleigh. That he made the second trip, also, and likewise faced the same unprotected water guage and did it again upon the return trip and that he made the third trip from Raleigh to Aberdeen and again faced the unprotected water glass and that this explosion and injury to the plaintiff occurred on the return from the third trip to Aberdeen, and that he did all of this without thinking of being hurt.

These quotations from the testimony are made at random. A careful examination of it will disclose that there was a conflict of testimony upon the material issues which, of course, takes the case to the jury.

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No. 257.

JAMES T. HORTON
vs.
SEABOARD AIR LINE RAILWAY.

BROWN, J., dissenting:

I am unable to agree with the conclusion reached by the Court in this case. The decision of the United States Supreme Court leaves it open to us to say whether the plaintiff, as a matter of law, assumed the risk of injury from the defective water glass. That question was not passed upon, and if it had been, upon the facts as then presented, that would not prevent a consideration of the question upon this appeal when the facts showing assumption of risk are much stronger.

The United States Supreme Court reversed our judgment and remanded the cause for further proceedings not inconsistent with their opinion.

Mr. Justice Pitney states the law of this case as follows:

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time, specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise." *Seaboard Air Line Railway vs. Horton*, 233 U. S. 492.

Applying this rule to the undisputed evidence, I am of opinion that the plaintiff assumed the risk of injury and is not entitled to recover.

Plaintiff was operating an engine equipped with a Buckner water

glass, which is so constructed that a thick guard glass is placed over the front of the water glass to protect the engineer from injury in the event the inner glass should explode. The engine was also equipped with another method of determining the amount of water in the boiler, that is by means of guage cocks placed on the head of the boiler. Plaintiff made the first trip from Raleigh to Aberdeen on July 27th, returning in the evening of July 28th, and he was returning from the third trip to Aberdeen when he sustained the injury to his eye by the explosion of the water glass, on August 4th. It required two days to make the round trip.

On the morning plaintiff was called to take this engine for the first trip to Aberdeen, he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the report on file in the round house or put it in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. Plaintiff, and a number of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard glass.

On August 4th, while engaged in shifting cars at Apex, N. C., the water glass exploded and injured his eye. Immediately after the explosion plaintiff cut off the guage glass at top and bottom, and the engine was operated to Raleigh with the guage cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass one or two inches wide, and eight or nine inches long, with a thickness of about one half of an inch. Plaintiff testified that the piece of glass in front of the tube is to prevent the flying glass from hitting the engineer in case the inner tube should burst; that the insertion of this glass will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes. In answer to questions on cross examination, plaintiff testified: "Yes, it is dangerous to run it (the engine) without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with the Buckner water gauge." Plaintiff further testified that at the time of the accident the steam pressure in the unprotected glass tube in the Buckner gauge was 200 pounds, and that it was liable to explode at any time. He said: "I knew that with that guard glass out that the tube was liable to explode with the 200 pounds pressure on it."

I knew that it was liable to explode, but I could not tell when." At the time of his injury, plaintiff was sitting on the left hand side of the cab, facing the glass which was within a few feet of his face. He said: "I was going to cross over on the fireman's side to see the conductor, whether he was ready to couple up, and that put me directly facing the glass, with my eye directly opposite that slit," and while in this position the explosion occurred. Plaintiff gave an estimate of the dimensions of the inner tube as follows: "12 or 14 inches long and about three-eighths of an inch thick, and one-half inch in diameter."

Plaintiff described the method of gauging the water in the boiler by the three gauge cocks and said that Benton, his fireman, brought the engine in from Apex to Raleigh using the gauge cocks
239 to tell how much water he had in the boiler. This was immediately after the accident. He said that he did not cut out the water gauge and use the gauge cocks on any of the three trips he made with this engine; that he did not attempt to run the engine without the water gauge glass. On a former occasion a water glass exploded and injured plaintiff's eye, while he was employed on one of defendant's engines.

Ernest Horton, plaintiff's witness, testified: "The water glass and gauge cocks are right upon the head of the boiler, right at hand, and he has to use them in running his engine, not constantly though. They are there all the time for his use. By turning those three gauge cocks you can gauge somewhere near about the water in the boiler, but you cannot tell the perfect level. The guard glass on the Buckner water gauge is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. This glass is put in there to prevent the glass from spattering out in case that glass bursts."

Dave Campbell, an engineer of ten years' experience, testified that an engineer can operate an engine in safety by the use of the gauge cocks; that if his water glass guard is missing, it would be his duty to cut out the glass and use the gauge cocks. He said: "It is very dangerous to use the Buckner water gauge without the guard glass, because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube on the Buckner water gauge is liable to explode. I have shut off the water gauge and run on the gauge cocks many a time." Lewis Archer testified for the defendant that he has been in the railroad business since 1882; that he is familiar with the construction and operation of the Buckner water glass. "It is a safe water glass with the guard glass in place. With the guard glass out of place, it is one of the most
240 dangerous things you could have on an engine, on account of that slot; when the glass breaks, it throws the glass out of that one place. You can operate an engine without a water gauge with safety, by using the gauge cocks. I consider that the safest plan of operation."

In my opinion the only conclusion to be drawn from this evidence is that no man of ordinary prudence would have continued to work in the face of so great and so imminent a danger. The

defendant moved for judgment of nonsuit at the conclusion of the evidence and requested the court to instruct the jury that if they believed the evidence they would answer the issue of assumption of risk "Yes." This has the effect of a request to withdraw the case from the jury.

It is said to be well settled by the Supreme Court of the United States that it is the duty of the trial court to withdraw a case from the jury where the evidence is undisputed, or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it. *Randall v. Railroad*, 109 U. S., 478. *Railroad v. Converse*, 139 U. S., 469. This rule has been applied by the Court in an action involving the defense of assumption of risk, where it appeared from plaintiff's evidence that he assumed the risk. *Butler v. Frazee*, 211 U. S., 459.

In the case of *District of Columbia v. McElligott*, 117 U. S. 622, the United States Supreme Court has applied the doctrine which, in my judgment, sustains the defendant's right to an instruction that plaintiff assumed the risk of injury. In that case the plaintiff, who was in the employ of the district, was injured while at work on a bank of gravel. The evidence tended to show that he discovered that there was danger of the bank caving in, and went to the supervisor for more men to do the work, and for one man to watch the bank, and that he received the information that

241 such assistance would be sent. Before the assistance arrived the bank caved in, causing his injury. The court said:

"Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed. * * * If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment—he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." *Roccia v. Coal Co.*, 121 Fed. 451; *Attleton v. Mfg. Co.*, 5 Ga. App. 779; *Railroad v. Watson*, 114 Ind. In *Alteriac v. Coal Co.*, 161 Ala., 435, it is held that, "Where a miner of many years' experience saw a pot or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder." In *Erdman v. Steel Co.*, 59 Wis. 6, the Wisconsin Supreme Court holds that: "An experienced servant cannot recover if he continues, even for an hour or two, to encounter the obvious and immediate danger of using a cracked saw to cut steel plates." In the case of *McAndrews*

v. Railroad, 39 Pac., 85, in which the plaintiff continued to use a defective hand-car which was likely to jump the track at any moment, the Supreme Court of Montana says:

"If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employee does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect."

These cases illustrate the rule that after promise to repair the workman assumes the risk if the danger is such that a prudent man would not continue to work in the face of it. That the danger in this case is of that character appears to me to require no argument.

I am of opinion also that defendant's request for instruction that plaintiff was guilty of contributory negligence should have been given. This is a question of law when the facts are undisputed. *Strickland v. Railroad*, 150 N. C. 4; *Aerkfetz v. Humphries*, 145 U. S. 418. Plaintiff used the defective water glass when he had at hand a safe way to operate his engine, that is, with the guage cocks. This was contributory negligence. *Covington v. Furniture Co.*, 138 N. C. 74; *Whitson v. Wrenn*, 134 N. C. 86.

There are other exceptions in the record, which are discussed in defendant's brief, raising important questions, but which I will not discuss. What I have written presents my views upon the main questions.

243 Supreme Court of North Carolina, February Term, 1915.

No. 257.

JAMES T. HORTON

vs.

SEABOARD AIR LINE RAILWAY.

Wake County.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Eighteen 60/100 dollars (\$18.60), and execution issue therefor.

244 SUPREME COURT OF NORTH CAROLINA, ss:

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the case of James T. Horton v. Seaboard Air Line Railway as the same now appear from the originals on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, N. C., this 28th day of June, 1915.

[Seal of the Supreme Court of the State of North
Carolina.]

J. L. SEAWELL,

Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 24,824. North Carolina Supreme Court. Term No. 541. Seaboard Air Line Railway, plaintiff in error, vs. James T. Horton. Filed July 6th, 1915. File No. 24,824.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

} No.541

On Writ of Error to the Supreme Court of
North Carolina.

BRIEF OF PLAINTIFF IN ERROR ON THE
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SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

No. 541

Brief of Plaintiff in Error on the Merits.

STATUS OF THE CASE

This case was first tried at April Term, 1911, of the Superior Court of Wake County, and dismissed upon motion for judgment of nonsuit, because the evidence of the plaintiff disclosed that he assumed the risk. Judge Whedbee, who tried the case, held the view that assumption of risk was a valid defense under the Federal Employers' Liability Act. On appeal to the Supreme Court of North Carolina a new trial was ordered upon the ground that contributory negligence under the Federal Act is a question for the jury. The question of assumption of risk seems not to have been considered by the Court, and in referring to the parts of the Federal Act material to this action, section 4, which relates to assumption of risk is not discussed (157 N. C., 146). Upon a second trial, October Term, 1912, of Wake Superior Court, the jury answered the issue of negligence "Yes," the issue of assumption of risk, "No," the issue of contributory negligence "Yes," and fixed damages at \$7,500. Defendant again appealed to the Supreme Court of North Carolina. In an opinion by Mr. Justice Allen (162 N. C., 424), section 4 of the Federal Employers' Liability Act was set out in full and its effect upon plaintiff's right to recover was discussed. The Court decided that while assumption of risk may be a defense under the Federal Act, the defendant had received the full benefit of such defense under the instructions to the jury, contained in the charge of the Court. The judgment of the Superior Court was affirmed. The case was then carried by writ of error to the United States Supreme

Court, and the judgment of the Supreme Court of North Carolina was reversed in an opinion by Mr. Justice Pitney, which is reported in 233 U. S., at page 492.

The Supreme Court of North Carolina construed the judgment of the United States Supreme Court as requiring another trial of this action by a jury, and it was tried at September Term, 1914, of Wake Superior Court. The jury answered the issue of negligence "Yes;" contributory negligence "No;" assumption of risk "No;" and damages, \$4,500. Defendant appealed from this judgment to the Supreme Court of North Carolina, and it was affirmed at Spring term, 1915, in an opinion by Chief Justice Clark (85 S. E., 218). Associate Justice Brown filed a dissenting opinion (85 S. E., 222). The case is now before this court on writ of error to the Supreme Court of North Carolina allowed by Chief Justice Clark.

Plaintiff in the court below, now defendant in error, filed motion to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina, and to transfer the cause to the summary docket. The motion to transfer to the summary docket was allowed.

STATEMENT OF THE CASE

This is an action brought by plaintiff, under the provisions of the Federal Employers' Liability Act, to recover damages for injury to his eye, caused by the explosion of a water glass on a locomotive engine.

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by the plaintiff, that he first made a report on this engine on July 28th, after his return from a round trip requiring two days. The explosion of the water glass, of which he complains, occurred August 4th, upon his return from the third trip to Aberdeen. (Printed record, page 47.)

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, called the Buckner Water Glass, which was invented by an engineer on the Seaboard Air Line Railway, and which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks. It was the plaintiff's duty, upon boarding his engine, to look at his water glass, and also test his gauge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order. (Printed record, page 82.)

On the morning plaintiff was called to take this engine (he had, prior to that time, been operating a passenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen, N. C., he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements, he placed the report on file in the round house or put it in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. Plaintiff, and a number of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that plaintiff made a ~~written~~ report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard glass. When asked why he failed to report the absence of the guard he said that it was for reasons best known to him-

self. This reply is contained in a written statement made by plaintiff soon after the accident. (Printed record, page 48.)

On August 4, 1910, while engaged in shifting cars at Apex, N. C., the plaintiff alleges that the water glass exploded and injured his eye. Immediately after the explosion Horton cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler. (Printed record, page 64.)

The guard glass referred to as a part of the Buckner equipment is merely a thick piece of glass one or two inches wide, and eight or nine inches long, with a thickness of one-half of an inch, according to plaintiff's testimony, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is not a complicated piece of machinery, but is a brass tube, with an opening in front and containing a small glass tube. (Printed record, page 41.) A thick piece of glass or two thin pieces of the proper size could be easily cut and placed in the slot.

Plaintiff testified that the piece of glass in front of the tube is to prevent flying glass from hitting you in case the inner tube should burst; that the insertion of this glass will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes. (Printed record, pages 41 and 42.)

In answer to questions on cross examination, plaintiff testified: *"Yes, it is dangerous to run it (the engine) without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with the Buckner water gauge."* (Printed record, page 47.) Plaintiff further testified that at the time of the accident the pressure in the unprotected glass tube in the Buckner gauge was 200 pounds, and that *it was liable to explode at*

any time. (Printed record, page 53.) He said: "I knew that with that guard glass out that the tube was liable to explode with the 200 pounds pressure on it. I knew that it was liable to explode, but I could not tell when." (Printed record, page 53.) "I knew it was dangerous to an engineer's eyes." (Printed record, page 52.)

At the time of his injury, plaintiff was sitting on the left hand side of the cab, facing the glass which was within a short distance of his face. He said: "I was going to cross over on the fireman's side to see the conductor, when he was ready to couple up, and that put me directly facing the glass, with my eye directly opposite that slit," and while in this position the explosion occurred. (Printed record, page 41.) The water glass is on the head of the boiler right at the engineer's hand. (Printed record, page 100.)

Plaintiff gave an estimate of the dimensions of the inner tube as follows: "12 or 14 inches long and about three-eighths of an inch thick, and one-half inch in diameter." (Printed record, page 43.)

Plaintiff describes the method of gauging the water in the boiler by the three gauge cocks (Printed record, page 46), and says that Mr. Benton, his fireman, brought the engine in from Apex to Raleigh using the gauge cocks to tell how much water he had in the boiler. This was immediately after the accident. He says that he did not cut out the water gauge and use the gauge cocks on any of the three trips he made with this engine; that he did not attempt to run the engine without the water gauge glass. (Printed record, page 52.)

On a former occasion a water glass exploded and injured plaintiff's eye, while he was employed on one of defendant's engines. (Printed record, page 53.)

Ernest Horton, plaintiff's brother, who is the only witness offered by plaintiff to testify as to the use of gauge cocks to determine the amount of water in the boiler, said: "The water glass and gauge cocks are right upon the head of the

boiler, right at hand, and he has to use them in running his engine, not constantly though. They are there all the time for his use. By turning those three gauge cocks you can gauge somewhere near about the water in the boiler, but you cannot tell the perfect level. * * * The gauge glass on the Buckner water gauge is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. As to why it is necessary to have a guard glass in there, that particular shield was patented for that. As to showing you the purpose of the guard, he patented it for the special protection that was gotten from it. It has not been patented very long. I could not tell you whether it is an expensive gauge, whether it cost much or did not. This glass is put in there to prevent the glass from spattering out in case the glass bursts. I have just answered why you want a protection in front of this glass tube here. I have just told you why you need a glass protection in here, to keep the glass from spattering out. The same amount of steam is in there as in the boiler, 150, 180, or 200. This is a protection to the engineer from the power of steam that comes down in that small tube. Every engineer knows that the same amount of power in the boiler comes down in this small tube. I do not know about these glass tubes wearing. I know that they explode, but I don't know about them wearing. Don't have any warning when they will explode. They may last a day, a week, a month or a year, and it may last an hour or shorter. As to running an engine without the water glass, when they break with me on the road, I shut them off and run without them. Then use the gauge cocks to tell how much water is in the boiler." (Printed record, page 101.)

W. S. Benton, defendant's witness, corroborated the plaintiff in his statement that he, Benton, used the gauge cocks in running the engine from Apex to Raleigh. He testified: "I was at a store at the time Mr. Horton said the water glass exploded. I was not on the engine. When I

came back I ran the engine from Apex to Raleigh. As to the condition of the water glass at that time, it was shut off, it was broke. It was shut off by two valves. I ran the engine back to Raleigh with the gauge cocks. I will explain that. By turning the gauge cocks, water would run out if it was there, but if the water was not there, steam would come out. Condition of the gauge cocks, they were open. They were in good condition. Those gauge cocks were put on the engine to gauge the water in the boiler. You can gauge the water in a boiler with the gauge cocks and without a water glass. That is what I did in running from Apex to Raleigh." (Printed record, page 64.)

D. K. Wright, who has been an engineer for thirty years, testified for defendant that an engine can be operated with gauge cocks and without a water gauge glass, and that this can be done with safety. He testified further that if an engineer should discover that the guard glass was missing from the Buckner gauge, it would be his duty to cut the water glass out and use the gauge cocks; that the gauge cocks are more accurate than the glass, but the latter is more convenient. (Printed record, page 70.)

Dave Campbell, an engineer of ten years experience, testified for defendant that an engineer can operate an engine in safety by the use of the gauge cocks; that if his water glass guard is missing, it would be his duty to cut out the glass and use the gauge cocks. He said: "It is *very dangerous* to use the Buckner water gauge without the guard glass, because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube on the Buckner water gauge is liable to explode. I have shut off the water gauge and run on the gauge cocks many a time." (Printed record, page 72.)

Lewis Archer testified for the defendant that he has been in the railroad business since 1882; that he is familiar with the construction and operation of the Buckner water glass.

"It is a safe water glass with the guard glass in place. *With the guard glass out of place, it is one of the most dangerous things you can have on an engine, on account of that slot; when the glass breaks, it throws the glass out of that one place.* You can operate an engine, a locomotive, without a water gauge with safety, by using the gauge cocks. I consider that the safest plan of operation." (Printed record, page 78.)

J. B. Pendleton, an engineer of thirty-two years experience, testified for defendant that it is not safe to use a water glass without the guard glass; that he ran an engine 12 or 15 years without a water glass. (Printed record, page 81.)

SPECIFICATIONS OF ERROR

The plaintiff in error specifies and relies upon the following exceptions and assignments of error:

ASSIGNMENT OF ERROR No. 1.

1. For that the Supreme Court of North Carolina erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on the 22nd day of April, 1908, especially in the construction of Sections 1, 3, 4 and 5.

ASSIGNMENT OF ERROR No. 2.

2. For that by these errors the Supreme Court of North Carolina decided against the rights set up and claimed by defendant under the said statute and denied to defendant a correct construction, interpretation and application of the provisions of said statute.

ASSIGNMENT OF ERROR No. 3.

3. For that the Supreme Court of North Carolina committed error in sustaining the trial court's overruling cer-

tain contentions made by plaintiff in error asserting a construction of the Federal Employers' Liability Act, approved by Congress April 22, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

ASSIGNMENT OF ERROR No. 4.

4. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 1 of said Act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

ASSIGNMENT OF ERROR No. 5.

5. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by defendant under Section 1 of the said Act of Congress, because of the holdings of the Supreme Court of North Carolina in construing certain instructions given and refused upon the first issue submitted to the jury, to-wit: Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? which said errors are hereinafter more particularly set forth.

ASSIGNMENT OF ERROR No. 6.

6. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 4 of the said Federal

Employers' Liability Act, approved by Congress of the United States on April 22, 1908, because of the holdings of the Supreme Court of North Carolina, because of certain instructions given and certain requests for instruction by plaintiff in error, which were refused, and because of certain incompetent evidence admitted upon the second issue submitted to the jury, to-wit: If so, did the plaintiff assume the risk of injury? which said errors are herein-after more particularly set forth.

ASSIGNMENT OF ERROR No. 7.

7. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act, approved by Congress of the United States, April 22, 1908, because of the holdings of the Supreme Court of North Carolina in construing this act and because of certain instructions given and certain requests for instruction by plaintiff in error, which were refused, upon the third issue submitted to the jury, to-wit, Did the plaintiff contribute to his own injury by his negligence, as alleged in the answer? which said errors are hereinafter more particularly set forth.

ASSIGNMENT OF ERROR No. 8.

(Exception No. 1, Printed record, page 42.)

8. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

"I told Powie Matthews that the guard glass was gone, and asked if he had any of them. He was the day round-house foreman and he said no, they did not have any here."

ASSIGNMENT OF ERROR No. 9.

(Exception No. 2, printed record, page 42.)

9. For that the Supreme Court of North Carolina erred in permitting plaintiff, J. T. Horton, over defendant's objection and exception, to testify that defendant's round-house foreman told him, "No, they did not have any (guard glasses) here (in Raleigh.)"

ASSIGNMENT OF ERROR No. 10.

(Exception No. 3, printed record, page 43.)

10. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception:

Q. What did you say to Powhatan Matthews?

Objection by defendant.

By the court:

To any statement as to the water glass, the defendant objects. Objection overruled. Defendant excepts.

ASSIGNMENT OF ERROR No. 11.

(Exception No. 4, printed record, page 44.)

11. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of the plaintiff, J. T. Horton, over defendant's objection and exception:

Q. State to the jury why you ran that engine out on the second trip without the guard glass in, Mr. Horton? A. Because I was promised I would have a guard glass when I returned; Mr. Matthews told me, and I was told to run her and I had to do it.

ASSIGNMENT OF ERROR No. 12.

(Exception No. 5, printed record, page 44.)

12. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in referring to the answer to the foregoing question, making the following statement and admitting testimony of plaintiff, J. T. Horton, as follows:

By the court:

Strike out what he was promised by Matthews, that part of it is stricken out, as that was a conclusion. You can say I ran it because of the conversation I had with Matthews.

A. That is right.

By the court:

All of the answer is stricken out and I will permit him to say I ran it on account of the conversation with Matthews.

ASSIGNMENT OF ERROR No. 20.

(Exception No. 13, printed record, page 54.)

20. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in admitting the following testimony of plaintiff, J. T. Horton, over defendant's objection and exception, and making the following statement:

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass.

Objection by the defendant. Objection sustained for the reason that this has been over on both the direct and cross examinations.

By Mr. Simms: Does your Honor understand that it is in the record that it is more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the Court: Yes, he said that, because they would stop up.

ASSIGNMENT OF ERROR No. 26.

(Exception No. 19, printed record, page 63.)

26. For that the Supreme Court of North Carolina erred in its construction and application of Sections 1, 3 and 4 of the Federal Employers' Liability Act, and in holding that the trial court did not commit error in overruling defendant's motion for judgment of nonsuit at the conclusion of plaintiff's evidence.

ASSIGNMENT OF ERROR No. 42.

(Exception No. 35, printed record, page 98.)

42. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing upon motion of the defendant, to strike out the following evidence of plaintiff's witness, Ernest Horton, admitted over defendant's objection and exception:

Q. What would be the proper thing to do, or would it be the proper thing in the event there was no guard glass on the water gauge to shut off the water glass and run the engine with the gauge cocks? A. I ran an engine over there for four years and I never shut the glass off.

ASSIGNMENT OF ERROR No. 43.

(Exception No. 36, printed record, page 104.)

43. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in overruling defendant's motion for judgment of nonsuit at the conclusion of all the evidence.

ASSIGNMENT OF ERROR No. 46.

(Exception No. 39, printed record, page 110.)

46. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

3. If you do not answer the second issue, Yes, then the Court charges you that if you believe the evidence, the plaintiff by his own negligence contributed to his injury, and you will answer the third issue, Yes.

ASSIGNMENT OF ERROR No. 47.

(Exception No. 40, printed record, page 110.)

47. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

5. The court instructs you that upon all the evidence in this case the absence of the guard glass and the risk incident to the use of the water gauge in that condition were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, and if plaintiff reported the absence of the guard glass to defendant's foreman and the foreman gave him a promise to repair, a reasonable time for the performance of such promise had expired, and plaintiff assumed the risk of injury and you will answer the second issue, Yes.

ASSIGNMENT OF ERROR No. 48.

(Exception No. 41, printed record, page 110.)

48. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress

in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

6. The court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise to repair, the danger was so imminent that no ordinarily prudent man, under the circumstances, would have relied upon such promise, and plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

ASSIGNMENT OF ERROR No. 49.

(Exception No. 42, printed record, page 110.)

49. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

7. The court instructs you that upon all the evidence in this case, if plaintiff reported the absence of the guard glass to defendant's foreman and was given a promise of repair, there is no evidence that he was induced by such promise to continue to use the engine with the water gauge in a defective condition, and you will answer the second issue, Yes.

ASSIGNMENT OF ERROR No. 50.

(Exception No. 43, printed record, page 111.)

50. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

8. The court instructs you that the absence of the guard glass and the risk incident thereto were so obvious that an

ordinarily prudent person would have observed and appreciated them, and you will answer the second issue, Yes, unless plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair.

ASSIGNMENT OF ERROR No. 51.

(Exception No. 44, printed record, page 111.)

51. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

9. If you find that the plaintiff reported the absence of the guard glass and was given a promise of repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the court instructs you to answer the second issue as to assumption of risk, Yes.

ASSIGNMENT OF ERROR No. 52.

(Exception No. 45, printed record, page 111.)

52. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in modifying, over defendant's objection and exception, defendant's request for instruction No. 11, by adding at the end thereof, "That is, relying on that promise, he continued to use the engine," as follows:

11. If you find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the gauge glass without guard glass, the court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue, Yes, unless the plaintiff has satisfied you by a preponderance of the evidence

that he reported the absence of the guard glass and was given a promise of repair, and that he was induced by such promise to continue in the employment.

The court modified the instruction by adding at the end thereof: "That is, relying on that promise, he continued to use the engine."

ASSIGNMENT OF ERROR No. 53.

(Exception No. 46, printed record, page 112.)

53. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

13. If you answer the first issue Yes, then the court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's roundhouse foreman that the guard glass was gone and was given a promise of repair, the time reasonably required for the performance had expired at the time of the explosion of the water glass and you will answer the second issue, Yes.

ASSIGNMENT OF ERROR No. 54.

(Exception No. 47, printed record, page 112.)

54. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

18. If you answer the first issue Yes, and if you find by the greater weight of the evidence that the plaintiff appre-

ciated the danger incident to the use of the water glass without the guard glass and that he could have shut off the glass, and operated the engine with safety by using the gauge cocks on his engine and that the plaintiff with such knowledge failed to shut off the glass and use the gauge cocks, then the court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue, Yes.

ASSIGNMENT OF ERROR No. 55.

(Exception No. 48, printed record, page 113.)

55. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

20. The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the greater weight of the evidence, you will answer the first issue, No.

ASSIGNMENT OF ERROR No. 56.

(Exception No. 49, printed record, page 113.)

56. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

21. If you find from the evidence that the engine could have been operated in safety by cutting off the water glass and using the gauge cocks, and that the plaintiff continued to use the water glass when he knew there was no guard glass on it and that it was dangerous to use the water glass in that condition, you will answer the first issue, No.

ASSIGNMENT OF ERROR No. 57.

(Exception No. 50, printed record, page 113.)

57. For that the Supreme Court of North Carolina erred in its construction and application of said act of Congress in holding that the trial court did not commit error in refusing, over defendant's objection and exception, to instruct the jury as follows, as requested by the defendant:

22. If you find from the evidence that the plaintiff could have performed his duties in operating the engine by using the gauge cocks for the purpose of telling how much water was in the boiler, and he continued to use the water glass without the guard glass, you will answer the first issue, No.

ASSIGNMENT OF ERROR No. 60.

(Exception No. 53, printed record, page 116.)

60. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exertion of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby.

ASSIGNMENT OF ERROR No. 62.

(Exception No. 55, printed record, page 116.)

62. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence would foreseen might naturally or probably produce the injury, and that it did actually produce it.

ASSIGNMENT OF ERROR No. 63.

(Exception No. 56, printed record, page 117.)

63. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

If you find from the evidence that the guard glass was in its proper place on the engine when the plaintiff started on his run on the morning of July 27, 1910, and that the defendant had no knowledge of the absence of such a glass, and it was the plaintiff's duty to make a note of the absence of the glass in writing on his work report, and he failed to do so, and you further find that the defendant's failure to have knowledge of the absence of the guard glass was due solely to the plaintiff's failure to make the report in writing of the absence of the guard glass, the court instructs you that there has been no negligence on the part of the defendant, and you will answer the first issue, No.

ASSIGNMENT OF ERROR No. 64.

(Exception No. 57, printed record, page 118.)

64. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in in-

structing the jury, over defendant's objection and exception, as follows:

Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, with which the injury would not have occurred.

ASSIGNMENT OF ERROR No. 65.

(Exception No. 58, printed record, page 118.)

65. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury, over defendant's objection and exception, as follows:

Contributory negligence arises when the plaintiff, as well as defendant, has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury.

ASSIGNMENT OF ERROR No. 71.

(Exception No. 64, printed record, page 129.)

7. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defendant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk.

ASSIGNMENT OF ERROR No. 72½.

(Exception No. 62½, printed record, page 121.)

72½. For that the Supreme Court of North Carolina erred in holding tdat the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

"If you answer the first issue 'Yes,' then the court charges you that under the Federal Employers' Liability Act, if you find that the plaintiff appreciated the risk incident to the use of the water gauge without the guard glass, and you should further find that the plaintiff told the defendant's roundhouse foreman that the guard glass was gone and was given a promise of repair, yet, if you should find that the time reasonably required for the performance of this promise had expired at the time of the explosion of the water glass, you will answer the second issue 'Yes.'"

ASSIGNMENT OF ERROR No. 74.

(Exception No. 67, printed decord, page 122.)

74. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury.

ASSIGNMENT OF ERROR No. 75.

(Exception No. 68, printed record, page 122.)

75. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the preponderance of the evidence, you will answer the issue Yes, and unless they have so satisfied you, you will answer it No.

ASSIGNMENT OF ERROR No. 76.

(Exception No. 69, printed record, page 123.)

76. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in instructing the jury over defendant's objection and exception, as follows:

The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's negligent act, and this may embrace indemnity for actual expenses incurred, in nursing, medical attention, loss of time, loss of ability to perform mental or physical labor, or capacity to earn money, and actual suffering of body or mind, which are the immediate and necessary consequences of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. That is the rule.

ASSIGNMENT OF ERROR No. 77.

(Exception No. 70, printed record, page 127.)

77. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion for judgment non obstante verdicto.

ASSIGNMENT OF ERROR No. 78.

(Exception No. 71, printed record, page 127.)

78. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion to set the verdict aside because the amount awarded is excessive.

ASSIGNMENT OF ERROR No. 79.

(Exception No. 72, printed record, page 127.)

79. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion to set the verdict aside as against the weight of the evidence.

ASSIGNMENT OF ERROR No. 80.

(Exception No. 73, printed record, page 127.)

80. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in refusing defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, in overruling defendant's motion for nonsuit and in the court's charge to the jury and in the court's refusal to give defendant's request for instruction.

ASSIGNMENT OF ERROR No. 81.

(Exception No. 74, printed record, page 127.)

81. For that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in signing judgment in this case as appears in the record.

ASSIGNMENT OF ERROR No. 83.

83. For that the Supreme Court of North Carolina erred in holding that:

"There was evidence from which the jury could find that while the absence of the guard glass was a defect causing the injury to the plaintiff, and which amounted to negligence on the part of defendant, yet it was not such an imminent danger which would justify excusing the defendant, if the plaintiff remained on service after reporting the defect and receiving assurance that it would be repaired."

ASSIGNMENT OF ERROR No. 84.

84. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action, because the said judgment denied to the plaintiff in error, Seaboard Air Line Railway, a construction of the Federal Employers' Liability Act, to which it was entitled and which, if granted, would have defeated the right of defendant in error to recover in this action.

ASSIGNMENT OF ERROR No. 85.

85. The Supreme Court of North Carolina for the various reasons set forth, committed error in rendering the final judgment that it did render against the plaintiff in error in this action.

ARGUMENT

Sufficiency of evidence to establish a cause of action or a defence under the Federal Employers' Liability Act is to be determined according to the rule of the Federal courts and not according to practice of the State courts.

The question of the sufficiency of evidence to establish a cause of action or a defense is not a matter of procedure, but goes to the very substance of the statute giving the right to maintain the action. If this is not true, then the trial court, in the first instance, and the appellate court of the State by review, can say what evidence establishes negligence under the Federal Employers' Liability Act and what evidence does not establish negligence, and can say what evidence establishes the defenses available under this act, and their decision of the matter would not be subject to review by the United States Supreme Court, because in matters of procedure the practice of the State court is controlling.

We submit that the sufficiency of the evidence to be submitted to the jury is a matter for the determination of the Federal Courts according to the well established rule of such courts, and that it is not open to the State courts to adopt and enforce a different rule.

St. Louis I. M. & S. Ry. v. McWhirter, 229 U. S., 265.

Central Vermont R. Co. v. White's Admx., 238 U. S., 507.

It is said to be well settled that it is the duty of the trial judge to withdraw a case from the jury where the evidence is undisputed, or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it.

Randall v. B. & O. R. Co., 109 U. S., 478.

Delaware L. & W. R. Co. v. Converse, 139 U. S., 469.

This rule has been applied by this court in an action involving the defense of assumption of risk, where it appeared from all of the evidence that plaintiff assumed the risk.

Butler v. Frazee, 211 U. S., 459.

"It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way."

Railroad v. Bank, 123 U. S., 727, 733.

These cases were recently reviewed by this court in an opinion by Mr. Justice Van Devanter, in which it is said:

"When, on the trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party. *Randall v. B. & O. R. Co.*, 109 U. S., 478; *Delaware L. & W. R. Co. v. Converse*, 139 U. S., 469; *Southern Pac. R. Co. v. Pool*, 160 U. S., 438; *Patton v. Texas & P. R. Co.*, 179 U. S., 658. The recognized mode of invoking the application of this rule is by preferring, at the conclusion of the evidence, a request for a directed verdict, and the ruling on such a request is subject to re-examination and approval or disapproval on writ of error in like circumstances and in like manner as are other rulings in matter of law during the course of the trial."

Lillian F. Slocum, Executrix v. New York Life Insurance Co., 228 U. S., 364.

In the present case, the defendant, at the conclusion of the evidence, requested the trial court to instruct the jury that if they believed the evidence, the plaintiff assumed the risk

of injury and they would answer the second issue "Yes." This instruction was refused and defendant excepted. (Exception No. 38, printed record, page 110; assignment of error No. 45.) The defendant now contends that this instruction should have been given.

Upon all the evidence in this case, plaintiff assumed the risk of injury from the defective water glass as matter of law.

In his dissenting opinion, Associate Justice Brown, of the North Carolina Supreme Court, says:

"The decision of the United States Supreme Court leaves it open to us to say whether the plaintiff, as a matter of law, assumed the risk of injury from the defective water glass. That question was not passed upon, and if it had been, upon the facts as then presented, that would not prevent a consideration of the question upon this appeal when the facts showing assumption of risk are much stronger.

The United States Supreme Court reversed our judgment and remanded the cause for further proceedings not inconsistent with their opinion.

Mr. Justice Pitney states the law of this case as follows:

"When the employee does know of the defect, and appreciates the risk that is attributal to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time, specified for its performance, the employee, relying upon the promise, does not assume

the risk unless at least the danger be so imminent that no ordinary prudent man under the circumstances would rely upon such promise.' *Seaboard Air Line Railway v. Horton*, 233 U. S., 492.

Applying this rule to the undisputed evidence, I am of opinion that the plaintiff assumed the risk of injury and is not entitled to recover." (Printed record, page 151.)

This question is raised by motion for judgment of nonsuit (Assignments of Error Nos. 26 and 43; Exceptions Nos. 19 and 36; printed record, pages 63 and 104), and by exceptions to refusal of the trial court to give defendant's requests for instruction (Exception 38, 40, 41, 42 (printed record, page 110) 43, 44, 45 (printed record, page 111) 46, 47 (printed record, page 112) and by the charge of the court on the issue of assumption of risk.

Numerous decisions hold, as stated by the Supreme Court in this case (*Seaboard Air Line Ry. v. Horton*, 233 U. S., 492), that where the danger is so manifest that a reasonably prudent man would not risk it, a promise to repair will not relieve the plaintiff from assumption of the risk.

One of the leading cases on this subject is *District of Columbia v. McElligott*, 117 U. S., 621. The principles established by this case are fully discussed and applied in *Roccia v. Coal Co.*, 121 Fed., at page 451, as follows:

"In the case of *District of Columbia v. McElligott*, 117 U. S., 622, the Supreme Court has expressed the doctrine which, in our judgment, sustains the instructions given to the jury by the court below. In that case the plaintiff, who was in the employ of the district, was injured while at work on a bank of gravel. There was evidence tending to prove that he discovered that there was danger of the bank caving in, and went to the supervisor of the district for more men to do the work, and for one man to watch the bank, and that he re-

ceived the information that such assistance would be sent. Before the assistance arrived the bank caved in, causing his injury. The court said:

‘Assuming that the district might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so manifest as to prevent a reasonably prudent man from risking it upon a promise of assurance by the proper authority that the cause from which the peril arose would be removed.’

The court then, after referring to the experience which the plaintiff had had in that kind of business, said:

‘And it was not implied in the contract between him and the district that he might needlessly and rashly expose himself to danger. On the contrary, if liability might come upon the district for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment—he would, notwithstanding any promises or assurances of the district supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received.’

“Here are expressed the extent and limit of the rules which control the questions now under consideration. First, if the workman expose himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, he assumes the risk of the danger which he knows and appreciates, and, if

the danger be so obvious or threatening as likely to cause injury at any moment, he has no right to continue at such work in the expectation that promised assistance will be sent. This principle of law the decision formulates without qualification, and irrespective of what a reasonably prudent man would or would not have done under the circumstances. The opinion elsewhere goes further to say, in substance, that if the danger be not obviously threatening of present injury, but yet if it be so imminent or manifest as to prevent a reasonably prudent man from assuming it, even with the promise of assistance, the master will not be liable."

The doctrine of the *McElligott* case has been applied by the State courts in the following cases:

"Where an employee knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger."

Railroad v. Watson, 114 Ind. Rep., 20.

"A compliance with a command from which it is evident to the servant that injury will likely result, and where to do so would be obviously rash, throws upon him the burden of assuming the risk. It is not the policy of the law that a person who wantonly places himself in a perilous situation, even though commanded by another to do so, can escape the consequences of his own negligence in so doing."

Attleton v. Bibb Mfg. Co., 5 Ga. App., 779.

"Where a miner of many years' experience saw a pot or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his su-

perior of it, and that he would not work without timbers, but who returned to the work under the pot or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder."

Alteriac v. West Pratt Coal Co., 161 Ala., 435.

"An experienced servant cannot recover if he continues, even for an hour or two to encounter the obvious and immediate danger of using a cracked saw to cut steel plates."

Erdman v. Steel Co., 95 Wis., 6.

In the case of *McAndrews v. Railroad*, 39 Pac., 85, in which the plaintiff continued to use a defective hand-car which was likely to jump the track at any moment, the Supreme Court of Montana says:

"If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employee does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect."

The case of *Albrecht v. Railroad*, 108 Wis., 530, is very similar to our case in its main facts, and recovery was denied on the ground of the imminence of the danger. In that case a locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the engine, and receiving the engineer's promise to see that a shield is furnished, leaves the terminal station where the shield can be procured, and proceeds on a trip, knowing that the promise had not been and cannot be fulfilled until the return, was held not entitled to recover.

In *Railway Company v. Kelton*, 55 Ark., 483, it appeared that plaintiff was injured while painting the wall of a depot for the defendant; that the ladder which was furnished him, about March first, was brittle and would not hold nails; that he made complaint between the fifth and tenth of March to his immediate superior, who promised to furnish him a safe ladder; that he continued to use the defective ladder until the injury occurred on April 20th following. The Supreme Court of Arkansas held:

"The promise on the part of the employer to furnish a better ladder would not justify the employee in looking to his employer for compensation for damages which he sustained by wantonly and recklessly encountering the danger which he knew necessarily attended the use of the old ladder."

In holding that employees in a mine assume the risk of injury from explosion of powder placed at a certain point for distribution, the Supreme Court of Arkansas says:

"But if there was danger to the operatives by reason of the powder being located for distribution at the point designated, it was a palpable risk or danger, which they assumed when they congregated about it. If there was danger in the place of storing, it was such a danger as no employee would be warranted in assuming for one moment, even under a promise of the master to remedy or discontinue."

Western Coal, etc., Co. v. Garner, 87 Ark., 190.

In *Levesque v. Janson*, 165 Mass., 16, it is said that the promise of defendant to furnish a new harness was not a sufficient excuse for the use by plaintiff of "old and rotten harness" in driving "a vicious and ugly horse," and it was held that plaintiff was wanting in due care as matter of law.

"Although a servant who has called the master's attention to a defective tool continues its use at the master's request, and on a promise to supply a better tool within a reasonably short time, he is not thereby freed from the charge of negligence contributing to his subsequent injury, where the character of the work is such that it cannot be prosecuted by means of the defective tool without subjecting him to such great or imminent risk of serious injury that a person of ordinary prudence would not incur it."

Musser-Sauntry Land, etc., Co. v. Brown, 126 Fed., 141.

In this case the court says:

"The law will not permit a person to place himself consciously in a situation where the danger of suffering the loss of life or limb is great and imminent, although he does conform to the wishes of his employer."

Circuit Judges Sanborn and Van Devanter concurred in the judgment of reversal upon the grounds set forth in Judge Thayer's opinion and also upon the further grounds that "the defect in the handle of the axe which the plaintiff was using was obvious and well known to him, that the danger from it was apparent and was appreciated by him, and that by continuing in the employment with this knowledge and appreciation he assumed the risk of the defects and dangers from which he suffered."

The word "imminent" conveys usually some idea of immediate—of something to happen upon the instant. But conceding this to be so in a general sense, yet it does not mean an instant consummation.

The Queen of the Pacific, 25 Fed., 610, 612.

Pierce v. C. H. Bidwell Thresher Co., 158 Mich., 356.

It is our position that there was nothing in this case to be submitted to the jury. The existence of the danger is admitted by the plaintiff. It is the very basis of his action. His knowledge and appreciation of the danger conclusively appear. The character of the danger as being great and imminent and a constant menace to the plaintiff's safety is, we submit, established by the uncontradicted evidence. The standard of conduct is fixed by the law as that of a prudent man. It is a function of the court and not of the jury to measure the conduct of the plaintiff and apply the standard. The plaintiff's conduct is not in dispute and, therefore, there is no question of fact to be passed upon by the jury.

"It has often been said that negligence is a pure matter of fact, or that, after the court has declared the evidence to be such that negligence may be inferred from it, the jury are always to decide whether the inference shall be drawn. But it is believed that the courts, when they lay down this broad proposition, are thinking of cases where the conduct to be passed upon is not proved directly, and the main or only question is what that conduct was, not what standard shall be applied to it after it is established. Most cases which go to the jury on a ruling that there is evidence from which they may find negligence, do not go to them principally on account of a doubt as to the standard, but of a doubt as to the conduct."

Holmes, *The Common Law*, p. 124.

The facts in this case established by the undisputed evidence are briefly as follows: That plaintiff, an experienced engineer, continued for three round trips of two days each to work within two or three feet of a water gauge glass, unprotected by a guard, and that such guard was intended for and essential to the plaintiff's protection; that the glass was so constructed that it focussed the force of an explosion in the

plaintiff's direction; that plaintiff's work required him to frequently look at this water gauge, and when engaged in work about the engine his face and eyes were constantly within the range of glass thrown out by an explosion of the gauge glass; that a gauge glass exploded on a previous occasion and injured plaintiff's eyes; that the gauge glass was 12 or 14 inches long, $\frac{1}{2}$ of an inch in diameter and the thickness of the glass about $\frac{3}{8}$ of an inch; that there was steam pressure in this glass of two hundred pounds; that it was impossible to tell when the glass would break and the force of the steam pressure drive particles of glass and hot water all over the side of the engine cab on which plaintiff was employed, the construction of the brass surrounding the glass tube focussing the particles of glass and the hot water and steam in that direction; that these glass tubes sometimes would last an hour, a day, a week, a month or a year; that the tube on plaintiff's engine was liable to explode at any moment; that plaintiff had no means of knowing beforehand the time of such explosion; that plaintiff knew it was dangerous to operate the engine without the guard glass; that at the time of the explosion plaintiff's face was turned in the direction of the defective water gauge, and in passing over to the fireman's side, his eye was brought to a position opposite the "slit" in the brass surrounding the tube, and while in this position the explosion occurred and pieces of glass were thrown in plaintiff's eye and injured his sight.

If the jury had found these facts upon a special verdict, and the court had been called upon to apply the standard of conduct fixed by the law, we submit, that the conclusion would have been irresistible that the danger with which plaintiff was confronted was so obvious and imminent that a man of ordinary prudence would not have continued to incur the risk in reliance on the promise to repair.

When the undisputed evidence leads to but one conclusion, assumption of risk is a question of law.

26 Cyc. 1479;

So. Pac. R. R. v. Seley, 152 U. S., 145.

Butler v. Frazee, 211 U. S., 459;

Keyner v. Portland Gold Mining Co., 184 Fed., 43, 46;

St. L. & S. F. R. Co. v. Snowden (Okl.) 149 Pac. 1083.

The position is taken in the concurring opinion of Associate Justice Walker (printed record, page 147) that the danger of injury from the explosion of this unguarded glass was not so imminent that a man of ordinary prudence would not rely upon the promise to repair, and the following evidence is said to support this view:

First. That Ernest Horton, plaintiff's witness, said it would be proper in his opinion to run an engine without cutting off the water glass, when the guard glass is missing.

This evidence was admitted over defendant's objection and exception. (Exception No. 35, printed record, page 98, discussed *infra*.) But conceding that this evidence is competent, it does not tend to show that a prudent man would have continued to work in the face of a danger so imminent and threatening as the explosion of an unprotected water glass. There is nothing to show that this witness was a man of ordinary prudence.

Second. That Edgar B. Barbee, witness for defendant, testified that engineers on the Seaboard have run their engines out with the water glass, without cutting it off, with the guard glass missing prior to the time plaintiff was injured. (Printed record, page 76.)

It does not appear that these engineers were working on engines of the same character as that upon which plaintiff was employed and having the same steam pressure, nor does it appear what precautions they used to prevent injury in

the event of an explosion. Again, we submit that the fact that other engineers engaged in an extremely dangerous practice does not establish or tend to establish that it was the conduct of a man of ordinary prudence. It has been often held that *custom* will not change the character of a manifestly dangerous act.

Third. That the fireman, Benton, performed his work with his face in the direction of this defective water glass. It will be found, we think, that the evidence does not establish this conclusion. It appears that there was only one opening in the brass surrounding the glass tube and that was in the direction of the engineer, and that the fireman's seat was on the opposite side of the engine and he was in no danger of injury from an explosion. That the fireman's place was a safe one is shown by the fact that when the explosion occurred the glass was thrown in the direction of the engineer's side of the cab. Benton says the water glass was on his side of the engine (printed record, page 64) but the opening was in the direction of the engineer, and the fireman was in no danger.

Again, we contend, that should it be conceded that the fireman submitted to the same risk as the engineer, Horton, this would neither show nor tend to show that the danger was of such character that a man of ordinary prudence would continue to work in its presence in reliance on the promise to repair.

Fourth. That the day roundhouse foreman, Matthews, told the plaintiff that he had to "run the engine like she is." This statement can have no effect upon the question of plaintiff's conduct, because he had equal experience and greater knowledge of the danger than the foreman.

Lindsay v. Contract Co. (Ky.) 92 S. W. 294.

In *B. & O. R. Co. v. Jones*, 95 U. S., 439, it was held that plaintiff was guilty of contributory negligence in riding in a dangerous position on the pilot of his engine. Plaintiff

attempted to justify his conduct by showing that other employees rode in this position and that he was told to get on his engine at any place. The court would not accept this as a justification and denied the employee's right to recover.

In *Smith v. Beandry*, 175 Mass., 286, 291, it is held that evidence as to the conduct of another employee in doing the work is immaterial, and properly excluded, because "it would have no tendency to prove or disprove that the defendant was negligent or that the risk was not obvious."

In the cases in which it has been held that the danger was not so imminent that a prudent man would not continue to work in its presence, it will be found that the plaintiff could in some way control the instrument or place, that is, the danger was not a constant one over which the plaintiff had no control, and with which he was at all times and under all circumstances confronted. As illustrating this, see *Dowd v. Erie Co.*, 70 N. J. Law 451. There it appears that certain gearing on the machine being operated by the plaintiff was not protected by a cover. Upon complaint, defendant's foreman had promised to have it attended to as soon as he could. This promise was made August 9; plaintiff was injured August 25 while shifting the belt on the machine by his hand slipping from the shifting lever and coming in contact with the unprotected gearing. Defendant contended that the danger was so obvious and imminent that it should have been held as a matter of law that the promise would not relieve the plaintiff from assumption of risk in continuing to use the machine without the guard.

Justice Swayze says:

"The accident in this case happened by reason of the plaintiff's hand slipping off the shifting lever, an occurrence that must have been unusual. The danger that his hand would slip and come in contact with the exposed gearing was not so imminent as to compel the

conclusion that the plaintiff was negligent in continuing to work at the unguarded machine and to require the court to take the case from the jury."

To same effect, *Hough v. Railway Company*, 100 U. S., 213.

There is no evidence that plaintiff was induced to run the engine in its dangerous condition on the third trip, when he sustained the injury, by a promise to repair, and defendant was entitled to the request for instruction covered by exception No. 42 (printed record, page 110.)

The sole testimony on this point is that of the plaintiff admitted over defendant's objection, that he ran the engine on the *second trip* without the guard glass in, because of the conversation with Matthews (printed record, pages 43-44.) This conversation occurred after the first trip, and when plaintiff took the engine out for the third trip, he knew that Matthews had not complied with his promise, if he had made one. It is held that the promise to repair must be the inducing motive for remaining in the employment.

Labatt on Master and Servant (1st Ed.) page 1184.

Burden of Proof on Issue of Assumption of Risk

The burden of proof is a matter of substance in which the State courts cannot follow their own practice and fix their own rules.

Central Vt. R. Co. v. White's Admx., 238 U. S., 507.

On this issue the court instructed the jury as follows:

"The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defendant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk." (Exception No. 64, printed record, pages 119-120.)

This instruction is erroneous, we submit, because it places upon the defendant the duty of offering evidence on the issues

of contributory negligence and assumption of risk. It is not the duty of the defendant to offer evidence on these issues. Conceding that the burden of the issue is on defendant, this burden can be sustained by evidence offered on behalf of plaintiff, without requiring defendant to offer evidence.

The court in various ways emphasized the charge that the burden of the issue of assumption of risk is on the defendant.

"If you answer the second issue 'Yes,' that he assumed the risk incident to his injury, the burden being upon the defendant to satisfy you of that by the greater weight of the evidence, you need not answer the third and fourth issues." (Exception No. 66, printed record, page 121.)

"The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury." (Exception No. 67, printed record, page 122.)

"The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the preponderance of the evidence, you will answer the issue 'Yes,' and unless they have so satisfied you, you will answer it 'No.'" (Exception No. 68, printed record, page 122.)

While these may be correct instructions in the abstract, yet as applied to the facts of this case, we submit, they are not correct. The existence of the defect and the appreciation of the danger incident thereto being established by plaintiff's evidence, the burden was on plaintiff to satisfy the jury by a preponderance of evidence that he reported the defect and was given a promise of repair.

"A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience, and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objection as to

the hazards. *The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule.*"

Malm v. Thelin, 47 Neb., 686.

Requested Instructions on the Issue of Assumption of Risk which the Trial Court refused to give.

The defendant requested the court to instruct the jury as follows:

"The court instructs you that the absence of the guard glass and the risk incident thereto were so obvious that an ordinarily prudent person would have observed and appreciated them, and you will answer the second issue 'Yes,' unless plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair." (Exception No. 43, printed record, page 111.)

"If you find that the plaintiff reported the absence of the guard glass and was given a promise of repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the court instructs you to answer the second issue as to assumption of risk, 'Yes.'" (Exception No. 44, printed record, page 111.)

These requests were refused and defendant excepted. The correctness of these instructions is supported by the following language of Mr. Justice Pitney:

"When an employee does know of the defect, and appreciates the risk that is attributed to it, then if he continues in the employment without objection, or without obtaining from his employer or his representative

an assurance that the defect will be remedied, the employee assumes the risk even though it arises out of the master's breach of duty.

"If, however,, there be a promise of reparation, even during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinary prudent man under the circumstances would rely upon such promise."

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

While the trial judge read the foregoing quotation to the jury, he did so in a general way and did not specifically say to the jury how they should answer the second issue if the facts were found to be as set forth in defendant's requests.

The requested instructions boil the matter down to the real question to be determined in considering the issue of assumption of risk. The absence of the guard glass was open and obvious and the danger known to and fully appreciated by plaintiff, according to his own testimony. There was nothing for the jury to find so far as these matters are concerned. Then, conceding a report of the defect and promise to repair (which is conceded in the requested instructions) it was correct to instruct the jury that if they should find by a preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, plaintiff assumed the risk and they should answer the second issue "Yes." Defendant was entitled to the requested instructions, and as the charge actually given did not cover them, we submit there was error.

Seaboard Air Line Railway v. Horton, *supra*.

The Court should have instructed the Jury that Plaintiff was Guilty of Contributory Negligence as a Matter of Law.

At a former trial of this case, the jury answered the issue of contributory negligence "Yes," when the evidence of such negligence, we submit, was much weaker than that appearing in this record.

Under the practice prevailing in North Carolina, when contributory negligence is established by plaintiff's evidence, it is the duty of the trial court to grant motion for judgment of nonsuit.

Strickland v. R. R., 150 N. C., 4;
 Mitchell v. R. R., 153 N. C., 116;
 Dunnevant v. R. R., 167 N. C., 232.

But under the Federal Act, it would not be proper to order a nonsuit because contributory negligence is not a bar to the action, but goes in diminution of damages under Sec. 3. It would, therefore, be the duty of the court, where it appeared from plaintiff's evidence that he was guilty of contributory negligence, to direct the jury to answer that issue "Yes." We submit that the defendant was entitled to such an instruction in this case and the court committed error in refusing to give it. (Exception No. 39, printed record, page 110, assignment of error No. 46.)

"Though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

Elliott v. Chicago, etc., R. Co., 150 U. S., 245;
 Aerkfetv. v. Humphreys, 145 U. S., 418;
 Schofield v. Chicago, etc., R. Co., 114 U. S., 615;
 Chicago, R. I. & P. R. Co. v. Houston, 95 U. S., 697.

An experienced workman is guilty of contributory negligence in continuing to work in a sand pit where the gravel and sod at the summit were permitted to overhang the base, and thus render the upper part of the bank liable to fall upon the man working below, notwithstanding the promise of the foreman, "I will secure the bank in a day or two, and I will warrant you that nothing will happen to you."

McCarthy v. Washburn, 58 N. Y. Supp., 1125.

"Where the condition of premises whereon an employee is set to work is such that danger is obvious to him as well as to the employer, the latter's assurance, when his attention is called to it, that at some future time the defect will be remedied, does not absolve the employee from the charge of contributory negligence in proceeding with his work."

Hannigan v. Smith, 50 N. Y. Supp., 845.

If defendant was negligent in furnishing a defective water gauge, we submit plaintiff was negligent in using it, if he had equal capacity with defendant to know and appreciate the danger and probability of injury. If the ideal prudent man would not furnish such an instrumentality, the ideal prudent man would not use it himself. Plaintiff was an expert engineer having capacity as great as the defendant, or any of its employees, to know the danger lurking in an unprotected Buckner gauge. He certainly had equal knowledge with the defendant of the absence of the guard glass. The plaintiff grounds his complaint upon the failure of the defendant to exercise the care of a prudent man in furnishing such gauge. The defendant answers that his conduct in using the defective gauge was equally the act of a man who did not measure up to the standard of ideal prudence.

Labatt on Master and Servant (2d Ed.), Vol. 3, page 3275.

The Court's Definitions of Contributory Negligence are Erroneous.

The Court, over the objection and exception of the defendant, instructed the jury as follows:

"Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." (Exception No. 57, printed record, page 118.)

"Contributory negligence arises when the plaintiff as well as defendant has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury." (Exception No. 58, printed record, page 118.)

In connection with the Court's definition of contributory negligence will be considered the following references to proximate cause:

"And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exertion of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinary prudent person would have foreseen that such consequence would likely be produced thereby. (Exception No. 53, printed record, page 116.)

"The law is, that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not anticipate the particular injury that did happen. Consequences which flow in unbroken sequence, without an intervening cause from the original negligent act are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular result which did follow." (Exception No. 54, printed record, page 116.)

"The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury and, second, that it did actually produce it." (Exception No. 55, printed record, page 116.)

We submit that it is not essential that the negligence of the employee shall be a *proximate* cause of the injury in order to constitute negligence in the sense that term is defined by the court. In this case it was contended by the defendant that plaintiff's contributory negligence, upon one phase of the evidence, consisted in continuing to work in the presence of a known danger, and that it was not the result of any act on his part which could be a proximate cause of the injury in the sense that term is used by the court.

The instructions emphasize the necessity that there must have been some active negligence on the part of the plaintiff, which seriously prejudices the position of defendant that by merely remaining at work under the circumstances he was guilty of contributory negligence.

There has been no negligence on the part of the defendant.

This question is raised by motion to nonsuit. (Exceptions Nos. 19 and 36, printed record record, pages 63 and 104, Assignments of Error Nos. 26 and 43), and by exception to the judge's charge, and also by refusal of the court to give the following instruction requested by the defendant:

"The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the greater weight of the evidence, you will answer the first issue 'No.' " (Exception No. 48, printed record, page 113). This question is also presented by refusal to give other requested instructions. (Exceptions Nos. 48, 49, 50, and 56, printed record, pages 113 and 117.)

It is not sufficient merely to prove that the plaintiff was injured through a defective water glass, but it must be shown that the defendant knew of the defects, or by reasonable care ought to have known of them.

Texas & P. R. Co. v. Barrett, 166 U. S., 617.

Patton v. Texas & P. R. Co., 179 U. S., 658.

Washington & G. R. Co. v. McDade, 135 U. S., 554, 570.

The law does not deny the master the right to make rules and regulations for the proper conduct of his business, and a rule requiring the servant charged with the care of a machine to inspect it and report defects is a proper exercise of the master's right.

It was the plaintiff's duty in this case to inspect his engine and report all defects in writing. But, without considering his duty to inspect, *the plaintiff had knowledge* of the absence of the guard glass, and even without a rule of the defendant, it was his duty to report it.

At the end of each of three round trips made by plaintiff on this engine he made a written report in compliance with

the defendant's rules; each time he noted necessary repairs to his engine, and in every instance he made no reference to the absence of the guard glass.

The form upon which plaintiff was required to make application for repairs to the engine will be found in the record (page 104).

From the undisputed evidence it appears that the defendant had established a specific method by which defects in an engine should be reported by the engineer having charge of it, and that this method was reasonable. The plaintiff, in compliance with this rule, made the required reports at the end of his trip, and on three successive reports omitted the fact that the guard glass was missing and failed to ask that this defect be remedied. Had he reported the defect as he was required to do, the master would have supplied the remedy. Certainly a servant should not complain of an injury directly attributable to his own failure in the performance of his duty. Notice of the defect is essential to charge the master with liability in this case, and the defendant was entitled to notice in accordance with its prescribed rules. This is not a question of contributory negligence in the violation of the rule. Compliance with the rule by the servant is necessary to establish a duty on the part of the master to repair the defect. If the failure to make the report was the result of negligence on the servant's part, the servant should suffer, and not the master. Horton's injury resulted from his own disobedience of the defendant's rules, and he has failed to establish any negligent omission of duty on the part of the defendant.

Holland v. Railroad, 143 N. C., 435.

Whitson v. Wrenn, 134 N. C., 86.

Stewart v. Carpet Co., 138 N. C., 60.

The plaintiff was aware of the danger in using this water-glass without a guard. The absence of the guard, which the

plaintiff said was put on the glass for the protection of the eyes of the engineer, was in itself sufficient notice that it was dangerous to use the glass without the guard.

By using the glass, under the circumstances, plaintiff signified a willingness to assume the risk, and brought himself within the maxim, "*Volenti non fit injuria*;" and, having willingly assumed the risk, the defendant's omission, if any, does not become actionable negligence.

Two circumstances are important to be considered upon the question of plaintiff's *willingness* to assume the risk: (1st) He continued to work in the face of an appreciated danger. (2d) He had conveniently at hand a means by which he could have obviated the danger, and failed to make use of it.

In another view of the case, plaintiff has failed to show that the defendant has been guilty of any negligence of which he can complain. There was open to him a way to operate this engine which was perfectly safe—that is, by cutting off the water glass and using the gauge cocks, as pointed out above. His failure to adopt the safe course was the sole proximate cause of the injury, and is attributed to the plaintiff's own fault.

The defendant contends that the plaintiff has failed to show negligence on the part of the defendant, because:

(1) He has failed to establish any duty to repair, in view of his failure to report the defect.

(2) He was willing to take the risk of injury.

(3) His use of a defective glass, when he had at hand a safe way to operate the engine, was the sole cause of his injury.

(1) Notice of Defect.

"In an action for personal injuries, while defendant has the burden of proof of contributory negligence, plaintiff must establish grounds of defendant's liability; and to hold the master responsible, the servant must

show by substantial proof that appliances furnished were defective, and knowledge of the defect or some omission in regard thereto."

Looney v. Railroad, 200 U. S., 480.

It is a principle of general application that the master must be fixed with notice of a defect in his appliances to create liability in favor of an employee who, with knowledge of the defect, has been injured thereby.

Hudson v. Railroad, 140 N. C., 499;

Blevin v. Cotton Mills, 150 N. C., 493;

Tabatt on Master and Servant (1st Ed.) Sec. 119
et seq.

Certainly, the defendant had no knowledge that the gauge cocks were not in good condition and did not afford ample means for plaintiff to gauge the water in the boiler.

(2) *Volenti non fit injuria.*

As to the class of risks arising subsequent to the contract of employment, two views of the principle upon which the master shall be relieved from liability have been expressed by the courts:

1. That such risks enter into and become part of the implied contract of service and are assumed by the servant as incident to the business as conducted.

2. The servant, by continuing in the service with knowledge of the danger and without complaint and promise to repair, consents to the continuance of the danger, thereby waiving the right to require of the master suitable tools and appliances in proper repair.

Whether the one or the other view is adopted as the true basis of the defense, the weight of authority seems to support the conclusion that where a servant enters into or remains in employment with knowledge of the danger, and contracts or consents to take the risk from a danger known to and

appreciated by him the master does not owe that servant any duty to remedy the dangerous condition, and is not guilty of negligence in failing to do so.

See cases cited *infra*.

The judgments of distinguished jurists sustain the view that evidence which shows that the servant had knowledge of the defect and appreciated the risk, and that this appreciation was attended by circumstances which make a proper case for the application of the maxim, *Volenti non fit injuria*, establishes that the master has been guilty of no breach of duty in exposing the servant to the risk. The application of the maxim, in a proper case, makes necessary a negative response to the issue of negligence.

Lord Bowen, in *Thomas v. Quartermaine*, L. R. 18 Q. B. Div., at page 695, gives an explanation of this doctrine, which Mr. Labatt calls "admirably lucid and forcible."

"If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendant."

Smith v. Baker, 60 L. J. Q. B. N.S., 683;

Thomas v. Quartermaine, L.R. 18 Q. B. Div.,
695, 697;

Katalla v. Rones, 186 Fed., 30;

Worden v. Gore-Meehan Co. (Conn.) 78 Atl., 422.

"No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur."

St. Louis Cordage Co. v. Miller, 126 Fed. Rep.,
at page 495, and cases cited at page 511.

Thompson on Negligence, Sec. 412.

Lord Bramwell says: "I hold that where a man is not physically constrained, when he can at his option do a thing or not, and he does it, the maxim applies.

What is '*volens*?' Willing. And a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwilling, with no good will; but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone."

Membrey v .Ry. Co., 14 App. Cases, at page 187.

(3) Plaintiff's use of a defective glass, when there was available a safe way to operate the engine, was the proximate cause of his injury.

"If there are two ore more ways or appliances to use to perform a given duty, and the employee selects voluntarily the more dangerous way or appliance, in case of a resulting injury, the employee will be held to have assumed the risk, and there will be no liability on the employer's part.

White's Personal Injuries on Railroads, Sec. 585.

"Where there is a safe and a dangerous method available for the performance of the work in hand, and the servant selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover."

Covington v. Furniture Co., 138 N. C., 374;
Dermid v. Railroad, 148 N. C., 183;

In the *Covington case*, Mr. Justice Connor says the plaintiff "should not have taken chances in the presence of an obvious, apparent and well-known danger; if he did so, and was hurt, he cannot cast upon the employer the blame or responsibility."

Cooperage Co. v. Headrick, 159 Fed., 683.

Horton was furnished with a safe and suitable engine, having upon it instrumentalities for determining the amount of water in his boiler which were sufficient for the purpose, and which were in good order. Horton, the engineer, and

Benton, the fireman, both testify that the gauge cocks were used in bringing the engine from Apex to Raleigh. (Printed record, pages 46 and 64.) If the defendant failed to furnish this engine with a water glass which was in good repair, the plaintiff cannot complain, because such failure was not the cause of the injury to the plaintiff. Horton was aware of the fact that two approved methods of measuring water had been adopted and attached to the engine; he was aware of the fact that one of these methods was in a dangerous condition; and the witnesses say it was Horton's duty to have used the safe method under such circumstances. It follows, therefore, that the plaintiff's injury did not result from the breach of any duty owed by the defendant, but from his own primary negligence in using the defective instrumentality.

Again, the defendant contends that upon the broad principle expressed in the maxim, "*Violenti non fit injuria*," the plaintiff should be denied the right to hold the defendant responsible for his injury.

Exceptions to Instructions on Issue of Negligence.

The court, over defendant's objection and exception, instructed the jury as follows:

"They, as I understand the decision, and as I charge you the decision is, hold it is not the duty of the railroad company, not an absolute duty that the railroad company owes to a servant to furnish an absolutely safe place, or absolutely safe and secure tools and appliances and equipment with which to do his work, but that the rule is that the railroad company shall exercise ordinary care and prudence to the end that—I want to use the exact language—to the end that the tools and appliances of the work may be safe for the workmen. The Supreme Court of the United States says that the common law rule is that an employer is not a guarantor of the safety of the place of work or of the ma-

chinery and appliances of the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman.

"It is the duty of the employer to exercise due care in respect to providing a safe place of work and suitable and safe appliances for the work." (Exception No. 51, printed record, page 115.)

It is true that the trial court uses the language of the opinion in this case, but we submit that Mr. Justice Pitney was writing about the standard of care to be exercised by the employer and not the character of the place of work. He was considering a charge in which the trial court had said that it was the *duty* of the employer to furnish the employee "safe, sound and suitable machinery, such as was reasonably safe," and the error in the charge which this court held to be prejudicial was the failure of the trial court to limit the defendant's duty to the exercise of ordinary care. The language of the opinion which the trial court quoted to the jury with respect to the defendant's duty apparently was not written with the view of holding the defendant to even the exercise of ordinary care to furnish *absolutely safe* tools and appliances and an *absolutely safe* place to work. Mr. Justice Pitney seems to have had in view more particularly the standard of care to be exercised than the standard of safety of the tools and place of work. *Reasonable safety* is the standard for the tools and place of work; ordinary care to procure and maintain reasonably safe tools and a reasonably safe place to work is the standard of care required of the master. In reading the opinion of the court it may be readily understood by lawyers that Mr. Justice Pitney intended *reasonable safety* when he uses the word "safe," but it must be presumed that the jury understood and accepted the word without qualification when the trial court instructed that it was defendant's duty to exercise ordinary care and prudence

"to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen." A jury may find tools and appliances and the place of work reasonably safe, when they would not find them *safe*. In this case, if a prudent man would continue to use the gauge glass, and work on the engine, with the guard glass missing, as plaintiff contends, the jury could very well have found that defendant had complied with its duty to exercise ordinary care to furnish reasonably safe tools and appliances and a reasonably safe place to work, whereas they would be unwilling to find that the defendant exercised ordinary care and prudence to furnish a *safe* place of work and *safe* tools and appliances, which is the standard of duty fixed by the charge in this case.

The rule as stated and adopted by the United States Supreme Court in the following cases is that it is the master's duty to exercise due care in respect to providing a reasonably safe place to work.

"To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employee is discharged when, but only when, its agents whose business it is to supply such instrumentalities, exercise due care, as well in their purchase originally as in keeping them in such condition as to be reasonably and adequately safe for use by employees."

Hough v. Railroad, 100 U. S., at page 218.

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply

the best and safest and newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

Washington & G. R. Co. v. McDade, 135 U. S., at page 570.

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ."

Choctaw, O. & G. R. Co., v. McDade, 191 U. S., 64.

In the case of *Gardner v. Railroad*, 150 U. S., at page 359, the Court says:

"The master is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection of the machinery or apparatus which may be provided for the use of employees, but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable, and in keeping and maintaining them in such condition as to be *reasonably safe* for use." (Italics added.)

In the case of *B. & O. Railroad v. Baugh*, 149 U. S. 368, Mr. Justice Brewer says:

"In the case of *Atchison, Topeka etc., Railroad v. Moore*, 29 Kansas, 632, 644, Mr. Justice Valentine, speaking for the court, thus succinctly summed up the law in these respects: 'A master assumes the duty towards his servant of exercising *reasonable care and diligence to provide the servant with a reasonably safe place at which to work*, with reasonably safe machinery, tools, and implements to work with, with reasonably

safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees." (*Italics added.*)

In *Powell v. American Sheet & Tin Plate Co.*, 216 Pa. St., 618, the Supreme Court of Pennsylvania says:

"It is not an accurate definition of the duty of a master to his servant to say that he must furnish 'a safe place to work and safe tools with which to work.' Employers are only required to furnish a reasonably safe place in which and reasonably safe tools with which to work. The distinction is based on substantial grounds. When a jury is instructed, without explanation or qualification, that it is the duty of an employer to furnish a safe place to work, their first inquiry very naturally would be, how safe? Must the place be absolutely safe, free from any danger, or only reasonably safe, subject to such risks and dangers, as are necessarily incident to the employment? When we say it is the absolute duty of an employer to furnish a safe place, a jury very properly concludes that the master was, under duty as thus defined, an insurer of the safety of his servants. Such is not the law: *Ardesco Oil Co. v. Gilson*, 63 Pa., 146; *P., W. & B. R. R. Co. v. Keenan*, 103 Pa., 124; *Wanamaker v. Burke*, 111 Pa., 423; *Titus v. Railroad Co.*, 136 Pa., 618; *Service v. Shoneman*, 196 Pa., 63. We have had occasion to review this question at some length in the recent case of *Welch v. Garlucci Stone Co.*, 215 Pa., 34, in which the rule of reasonable safety as to place and tools was discussed and adhered to. It was there stated that the word 'safe,' as used in this connec-

tion must be understood to mean reasonably safe according to the usages, risks and dangers of the employment. There is error in that part of the charge of the learned trial judge wherein it is said, 'If there is any neglect upon the part of the employer in furnishing a safe place to work or in furnishing safe tools with which to work, then the employer is liable.' This definition states the rule too broadly and places upon the employer a higher standard of care than the law requires. It is not 'any neglect' on the part of the employer in furnishing a safe place to work or safe tools with which to work that makes him liable in damages in case of an accident. To hold that any neglect in furnishing either a safe place or safe tools would make an employer liable in damages is the equivalent of saying that he must provide them a place and tools absolutely safe. This is not the rule."

"The duty which the defendant owed to the plaintiff in respect of the place in which and the machinery about which he was to work was not that of making them absolutely safe, but of *exercising ordinary care to make them reasonably safe*, and the burden of affirmatively proving a breach of that duty was with the plaintiff. So, in the absence of such proof, the defendant was entitled to rest upon the usual presumption of the exercise of ordinary care." (*Italics added.*)

Kyner v. Portland Gold Mining Co., 184 Fed., 43, 47, per Van Devanter, Circuit Judge.

Erroneous Instruction on Issue of Damages.

The court, over defendant's objection and exception, instructed the jury as follows:

"The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss result-

ing from defendant's negligent act, and this may embrace indemnity for actual expense incurred, in nursing, medical attention, loss of time, loss of money and actual suffering of body or mind, which are the immediate and necessary consequences of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion as that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. 'That is the rule.' (Exception No. 69, printed record, page 123.)

The error in this instruction of which the defendant complains, consists in stating the elements of damages to which plaintiff was entitled and then saying "*to which you may add such amount in your sound discretion as that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of.*"

We submit that this is an erroneous statement of the measure of damages and permits the jury to form an estimate of the damages according to the correct rule and then add to such amount something additional for the injuries complained of.

That an erroneous instruction on the issue of damages, in an action based upon the Federal Employers' Liability Act, is sufficient to sustain a reversal, is established by the following cases:

Norfolk & W. R. R. Co. v. Holbrook, 235 U. S., 625.
Kansas city S. R. Co. v. Leslie, 238 U. S., 599.

Exceptions to Evidence.

We recognize the fact that ordinarily questions of the admissibility of evidence in an action under the Federal Employers' Liability Act are regulated by the rules in force in the courts of the State in which the action is tried, but we wish to present to the court the view that this is not true when the admission of such evidence deprives the defendant of a defense available under the Federal Act.

As an example of our contention in this respect, we refer to Assignments of Errors Nos. 8, 9, and 10, Exceptions Nos. 1, 2, and 3. (Printed record, pages 42 and 43.)

1. The plaintiff was permitted to testify that he told Powie Matthews, defendant's day round-house foreman, that the guard glass was gone, and asked if he had any of them and he said they did not have any, and did not keep them in stock; that they were in Portsmouth and he would send to Portsmouth and get one; that he said further: "You will have to run her like she is." This evidence was admitted over defendant's objection and exception. (Exceptions 1, 2 and 3, printed record, pages 42 and 43.)

It is not alleged in the complaint that plaintiff reported the absence of the guard glass, either verbally or in writing, and was given a promise of repair.

In a verified amendment to the complaint, plaintiff alleges that this water glass was "imperfect, defective, dangerous and unsafe in the following particulars, which were also known to the defendant, and by it negligently allowed to continue and exist, to-wit: In that the same had no guard glass or shield in front thereof, and in connection therewith." (Printed record, page 31.)

Upon the evidence of plaintiff, in the absence of the testimony to which defendant objected, the trial court would have been compelled to hold that plaintiff assumed the risk, as a matter of law upon the authority of the opinion of this court. The right of the defendant to this defense was, there-

fore destroyed by the admission of evidence in support of a claim that was not pleaded.

Having alleged that the water glass furnished him was defective and unsafe and that he was operating his engine with the water glass in that condition, and when he was fully aware of its condition, the burden rested upon plaintiff to establish the fact that he reported the defect and received a promise of repair. This was an issuable fact.

In the absence of allegation, proof of these facts was incompetent.

"A servant must either aver his want of knowledge of the defect which caused the injury, or that, having such knowledge, he informed the master and continued in the employment upon a promise, express or implied, to remedy the defect."

Railroad v. Norman, 49 Ohio St., 598;

Griffiths v. Docks Co., 13 Q. B. Div., 259.

"Evidence tending to show that defective machinery was used under a promise by the master to remove the defect, *held* inadmissible where such promise had not been pleaded."

Malm v. Thelin, 47 Neb., 686.

2. On direct examination, plaintiff was asked:

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass?

Objection by the defendant. Objection sustained for the reason that this has been over on both the direct and cross examinations.

By Mr. Simms (counsel for plaintiff): Does your Honor understand that it is in the record that it is more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the court: Yes, he said that, because they would stop up.

To the foregoing statement, defendant in apt time objects. Exception No. 13, printed record, page 54.)

The harmful effect of this statement seems to use to be manifest. The defendant alleged that the plaintiff was guilty of contributory negligence because he used a dangerous method of gauging the water in the boiler, by using the gauge glass without the shield when he had at hand a safe way of doing this work. The defendant contended that it was the plaintiff's duty as a reasonably prudent man to cut off the water gauge and use the gauge cocks. This position could not be met by more potent evidence than that suggested in this question, and the statement of the court, that it was more dangerous to attempt to run the engine with the water glass closed and with the gauge cocks than with the water glass in its defective condition. If that fact should be found by the jury, then the defendant's contention on the issue of contributory negligence would be destroyed.

We have searched the evidence of the plaintiff with great care and have been unable to find any statement that it was more dangerous to attempt to run the engine with the gauge cocks than with the water glass because they would stop up. His evidence on this point which will be found in the record, is as follows:

"Yes, you can operate an engine without a water gauge, but with the water cocks, but not as well. You cannot keep these cocks open. They are liable to stop up, but a water glass has got so much bigger opening here than the gauge cock. They are the safest things at all, as they do not stop like the gauge cocks, like all of the gauge cocks I have seen. I have run an engine many a time with the gauge cocks stopped up. Yes, you can run an engine with the water

glass and with the gauge cocks if they stay open. I could have run this engine without the water glass and with the gauge cocks if they were in working order. Were they in working order or not? My opinion one of them possibly was working all right. I think possibly a little steam would come out of them." (Printed record, page 52.)

It will be noted that when plaintiff says that water gauge glasses are "the safest thing at all," he is referring to such glasses with the guard glass in place. He testified repeatedly that the gauge glass without the guard was *dangerous*. He said: "Yes, it is dangerous to run it without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with that Buckner water gauge." (Printed record, page 47.)

The statement of the court, we submit, is not supported by the evidence, and, as an inference, is not justified by the testimony of the plaintiff. When the court, to whom the jury look for guidance in all things connected with the trial, stated that plaintiff had testified that the gauge cocks were more dangerous than the defective water glass, an impression was made on the minds of the jury which was impossible for the defendant to eradicate. We earnestly submit that this statement by the court was so prejudicial as to entitle the defendant to a reversal of this judgment.

3. Plaintiff's witness, Ernest Horton, was permitted to testify as follows:

Q. What would be the proper thing to do, or would it be the proper thing in the event there was no guard glass on the water gauge to shut off the water glass and run the engine with the gauge cocks?

A. I ran an engine over there for four years and I never shut the glass off.

Objection by the defendant, asking that this be stricken out.

By the court: He is asked what is the proper and safe way to do.

By the witness: The proper way in my opinion would be to run with the water glass turned on.

We submit that it is incompetent to permit this witness to testify as to what he did with respect to shutting off the water glass. In the first place, there is no evidence that conditions were similar. There is nothing to show that he was using a Buckner gauge and no evidence that the water glass he was using was of a dangerous character. The purpose of this evidence is to show that the plaintiff was acting the part of prudence in using the defective water glass.

This witness did not qualify as an expert, but if he had so qualified, his expression of opinion upon the very question to be decided by the jury would have been incompetent.

Jones on Evidence (2d Ed.) Sec. 372 and note.

Formal Exceptions.

Exceptions Nos. 70, 71, 72, 73 and 74 (printed record, page 143) are formal and are covered by the discussion of other exceptions herein.

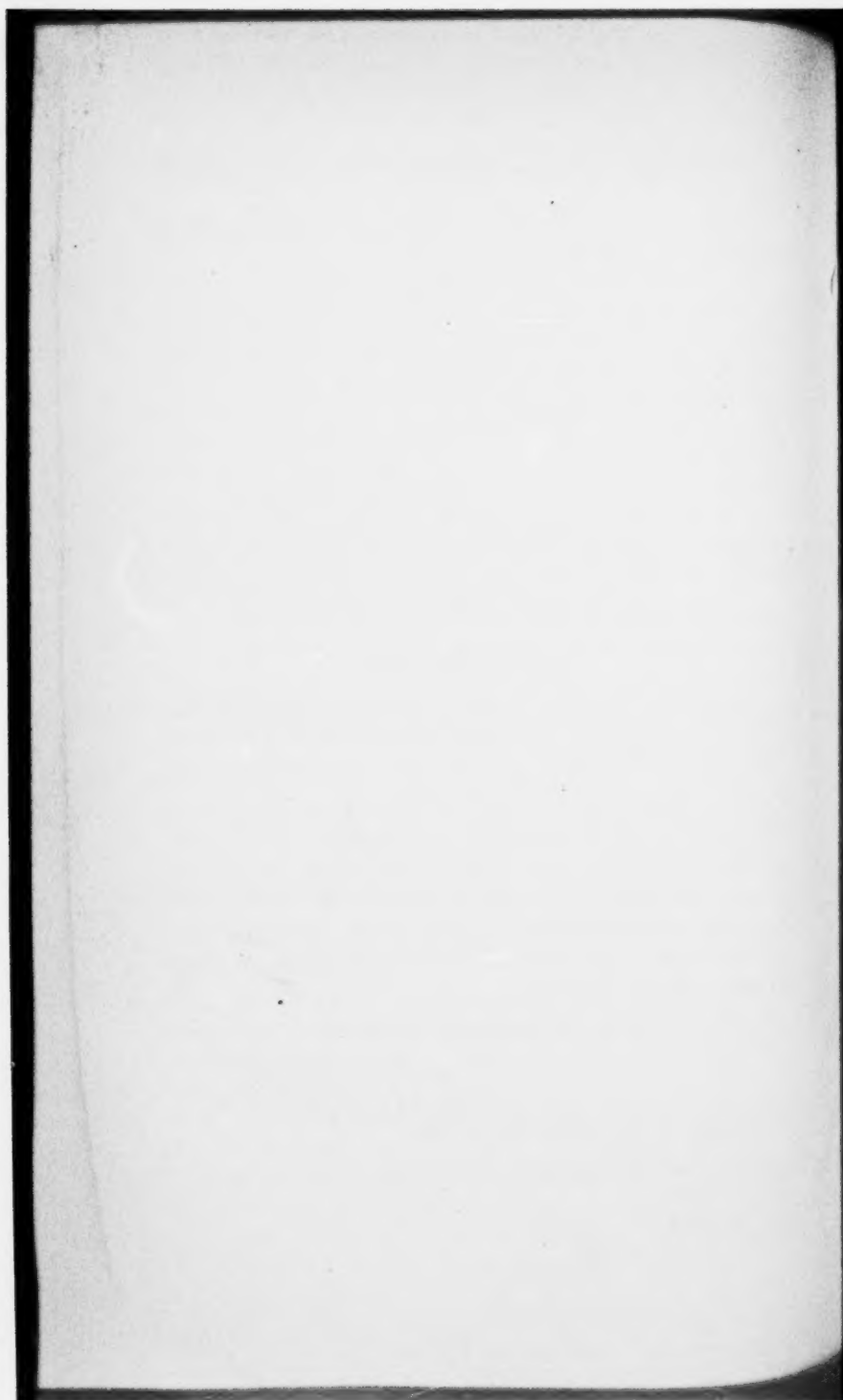
In conclusion, we earnestly contend that in the trial of this case plaintiff in error has been deprived by the errors pointed out of important rights arising under the Federal Employers' Liability Act and has been denied a proper construction and application of the provisions of that Act, for which we ask be a reversal of the judgment of the Supreme Court of North Carolina.

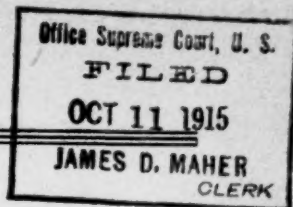
Respectfully submitted,

MURRAY ALLEN,

Attorney for Plaintiff in Error.

Raleigh, N. C., November 8, 1915.





IN THE
Supreme Court of the United States.
OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

No. 541

On Writ of Error to the Supreme Court of
North Carolina.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO
MOTIONS ON BEHALF OF DEFENDANT IN
ERROR TO DISMISS THE WRIT OF ERROR
OR AFFIRM THE OPINION AND JUDGMENT
OF THE SUPREME COURT OF NORTH CAR-
OLINA, AND TO TRANSFER THIS CAUSE
TO THE SUMMARY DOCKET.

MURRAY ALLEN,
Counsel for Plaintiff in Error

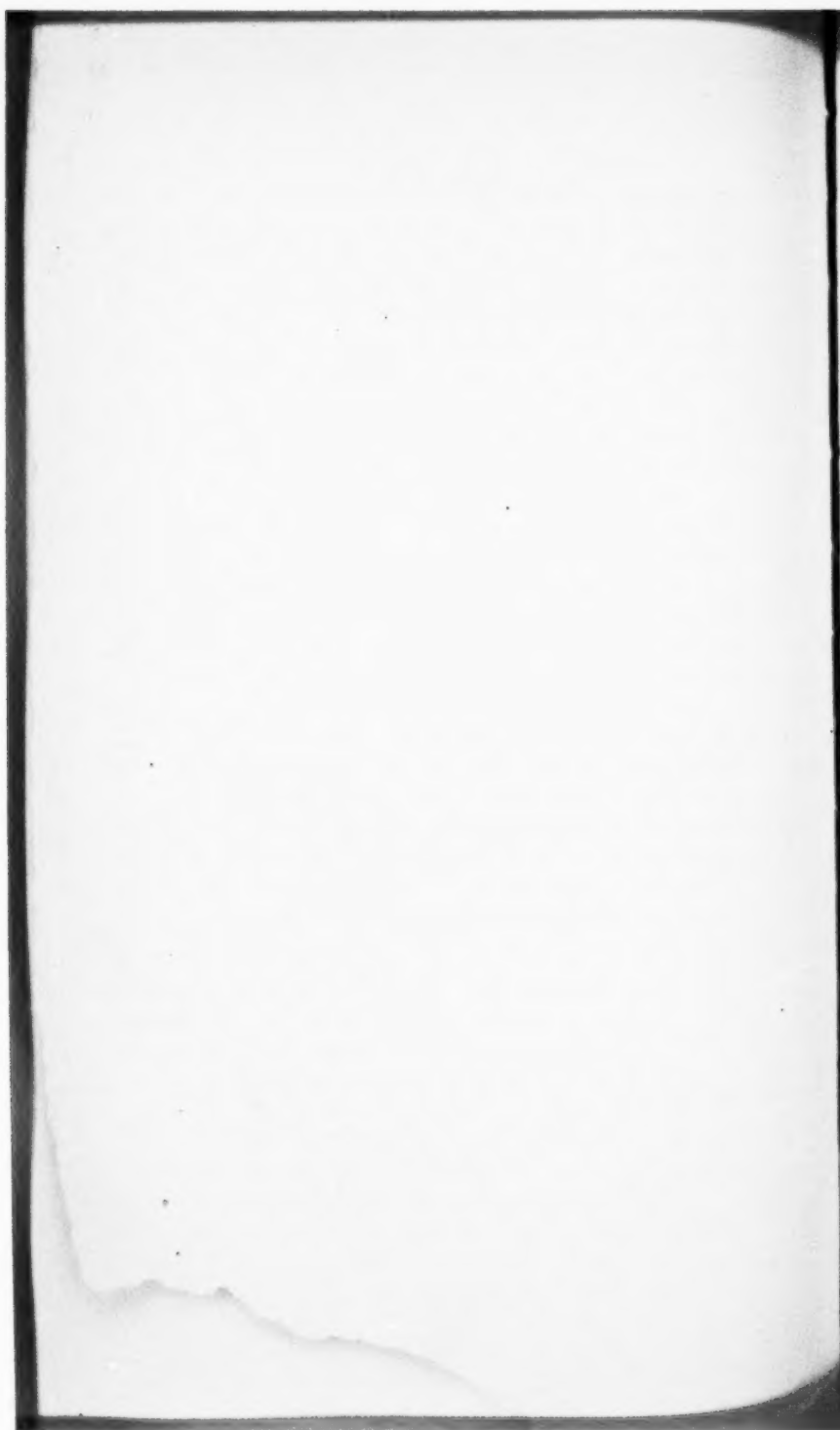
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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

No. 541

On Writ of Error to the Supreme Court of
North Carolina.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO
MOTIONS ON BEHALF OF DEFENDANT IN
ERROR TO DISMISS THE WRIT OF ERROR
OR AFFIRM THE OPINION AND JUDGMENT
OF THE SUPREME COURT OF NORTH CAR-
OLINA, AND TO TRANSFER THIS CAUSE
TO THE SUMMARY DOCKET.



SEABOARD AIR LINE RAILWAY

V.

JAMES T. HORTON

Brief of plaintiff in error in reply to motions on behalf of defendant in error to dismiss the writ of error or affirm the opinion and judgment of the Supreme Court of North Carolina, and to transfer this cause to the summary docket.

STATUS OF THE CASE.

This case was first tried at April Term, 1911, of the Superior Court of Wake County, and was nonsuited by his Honor, H. W. Whedbee, because the evidence of the plaintiff disclosed that he assumed the risk. Judge Whedbee held the view that assumption of risk was a valid defense under the Federal Employers' Liability Act. On appeal to the Supreme Court of North Carolina a new trial was ordered upon the ground that contributory negligence under the Federal Act is a question for the jury. The question of assumption of risk seems not to have been considered by the Court, and in referring to the parts of the Federal Act material to this action, section 4, which relates to assumption of risk is not discussed (157 N. C., 146). Upon a second trial, October Term, 1912, of Wake Superior Court, the jury answered the issue of negligence, "Yes," the issue of assumption of risk, "No," the issue of contributory negligence "Yes," and fixed the damages at \$7,500. Defendant again appealed to the Supreme Court of North Carolina. In an opinion by Mr. Justice Allen (162 N. C., 424), section 4 of the Federal Employers' Liability Act is set out in full and its effect upon the plaintiff's right to recover is discussed. The Court decided that while assumption of risk might be a defense under the Federal Act, the defendant had received the full benefit of such defense under the instructions to the jury,

contained in Judge Ferguson's charge. The judgment of the Superior Court was affirmed. The case was then carried by writ of error to the United States Supreme Court, and the judgment of the Supreme Court of North Carolina was reversed in an opinion by Mr. Justice Pitney, which is reported in 233 U. S., at page 492.

The Supreme Court of North Carolina construed the judgment of the United States Supreme Court as requiring another trial of this action by a jury, and it was tried at September term, 1914, of Wake Superior Court. The jury answered the issue of negligence "Yes;" contributory negligence "No;" assumption of risk "No;" and damages, \$4,500. Defendant appealed from this judgment to the Supreme Court of North Carolina, and it was affirmed at Spring term, 1915, in an opinion by Chief Justice Clark (85 S. E., 218). Associate Justice Brown filed a dissenting opinion (85 S. E., 222). The case is now before this Court on writ of error to the Supreme Court of North Carolina allowed by Chief Justice Clark.

Plaintiff in the court below, now defendant in error, files motion to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina, and to transfer the cause to the summary docket.

STATEMENT OF THE CASE.

This is an action brought by plaintiff, under the provisions of the Federal Employers' Liability Act, to recover damages for injury to his eye, caused by the explosion of a water glass on a locomotive engine.

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by the plaintiff, that he first made a report on this engine on July 28th, after his return from a round trip requiring two days. The

explosion of the water glass, of which he complains, occurred August 4th, upon his return from the third trip to Aberdeen.

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, called the Buckner Water Glass, which was invented by an engineer on the Seaboard Air Line Railway, and which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks, which is a method used exclusively by some of the most important railroads in the United States. It was the plaintiff's duty, upon boarding his engine, to look at his water glass, and also test his gauge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order.

On the morning that plaintiff was called to take this engine (he had prior to that time been operating a passenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen, N. C., he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the report on file in the round house or put it in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. Plaintiff, and a number of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted

every defect in his engine except the absence of the guard glass. When asked why he failed to report the absence of the guard he said that it was for reasons best known to himself. This reply is contained in a written statement made by plaintiff soon after the accident.

On August 4, 1910, while engaged in shifting cars at Apex, N. C., the plaintiff alleges that the water glass exploded and injured his eye. Immediately after the explosion Horton cut off the guage glass at top and bottom, and the engine was operated to Raleigh with the guage cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is merely a thick piece of glass one or two inches wide, and eight or nine inches long, with a thickness of one-half of an inch, according to plaintiff's testimony, and is detached from the guage, being placed in slots arranged for the purpose of holding it. The Buckner guage is not a complicated piece of machinery, but is a brass tube, with an opening in front and containing a small glass tube. A thick piece of glass or two thin pieces of the proper size could be easily cut and placed in the slot.

Plaintiff testified that the piece of glass in front of the tube is to prevent flying glass from hitting you in case the inner tube should burst; that the insertion of this glass will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes.

In answer to questions on cross examination, plaintiff testified: "*Yes, it is dangerous to run it (the engine) without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with the Buckner water guage.*" Plaintiff further testified that at the time of the accident the pressure in the unprotected glass tube in the Buckner guage was 200 pounds, and that

it was liable to explode at any time. He said: "I knew that with that guard glass out that the tube was liable to explode with the 200 pounds pressure on it. I knew that it was liable to explode, but I could not tell when." (Printed record, page)

At the time of his injury, plaintiff was sitting on the left hand side of the cab, facing the glass which was within a few feet of his face. He said: "I was going to cross over on the fireman's side to see the conductor, whether he was ready to couple up, and that put me directly facing the glass, with my eye directly opposite that slit," and while in this position the explosion occurred. (Printed record, page)

Plaintiff gave an estimate of the dimensions of the inner tube as follows: "12 or 14 inches long and about three-eighths of an inch thick, and one-half inch in diameter." (Printed record, page)

Plaintiff describes the method of gauging the water in the boiler by the three guage cocks (printed record, page), and says that Mr. Benton, his fireman, brought the engine in from Apex to Raleigh using the guage cocks to tell how much water he had in the boiler. This was immediately after the accident. He says that he did not cut out the water guage and use the guage cocks on any of the three trips he made with this engine; that he did not attempt to run the engine without the water guage glass. (Printed record, page)

On a former occasion a water glass exploded and injured plaintiff's eye, while he was employed on one of defendant's engines. (Printed record, page)

Ernest Horton, plaintiff's brother, who is the only witness offered by plaintiff to testify as to the use of guage cocks to determine the amount of water in the boiler, said: "The water glass and guage cocks are right upon the head of the boiler, right at hand, and he has to use them in running his engine, not constantly though. They are there all the

time for his use. By turning those three guage cocks you can guage somewhere near about the water in the boiler, but you cannot tell the perfect level. The guard glass on the Buckner water guage is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. As to why it is necessary to have a guard glass in there, that particular shield was patented for that. As to showing you the purpose of the guard, he patented it for the special protection that was gotten from it. It has not been patented so very long. I could not tell you whether it is an expensive guage, whether it cost much or did not. This glass is put in there to prevent the glass from spattering out in case that glass bursts. I have just answered why you want a protection in front of this glass tube here. I have just told you why you need a glass protection in here, to keep the glass here from spattering out. The same amount of steam is in there as in the boiler, 150, 180, or 200. This is a protection to the engineer from the power of steam that comes down in that small tube. Every engineer knows that the same amount of power in the boiler comes down in this small tube. I do not know about these glass tubes wearing. I know that they explode, but I don't know about them wearing. Don't have any warning when they will explode. They may last a day, a week, a month or a year, and it may last an hour or shorter. As to running an engine without the water glass, when they break with me on the road, I shut them off and run without them. Then use the gauge cocks to tell how much water is in the boiler." (Printed record, page)

W. S. Benton, defendant's witness, corroborated the plaintiff in his statement that he, Benton, used the gauge cocks in running the engine from Apex to Raleigh. He testified: "I was at a store at the time Mr. Horton said the water glass exploded. I was not on the engine. When I came back I ran the engine from Apex to Raleigh. As to the condition of the water glass at that time, it was shut off, it was

broke. It was shut off by the two valves. I ran the engine back to Raleigh with the gauge cocks. I will explain that. By turning the gauge cocks, water would run out if it was there, but if the water was not there, steam would come out. Condition of the gauge cocks, they were open. They were in good condition. Those gauge cocks were put on the engine to gauge the water in the boiler. You can gauge the water in a boiler with the gauge cocks and without a water glass. That is what I did in running from Apex to Raleigh."

D. K. Wright, who has been an engineer for thirty years, testified that an engine can be operated with gauge cocks and without a water gauge glass, and that this could be done with safety. He testified further that if an engineer should discover that the guard glass was missing from the Buckner gauge, it would be his duty to cut the water gauge glass out and use the gauge cocks; that the gauge cocks are more accurate than the glass, but the latter is more convenient.

Dave Campbell, an engineer of ten years experience, testified that an engineer can operate an engine in safety by the use of the gauge cocks; that if his water glass guard is missing, it would be his duty to cut out the glass and use the gauge cocks. He said: "It is *very dangerous* to use the Buckner water gauge without the guard glass, because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube on the Buckner water gauge is liable to explode. I have shut off the water gauge and run on the gauge cocks many a time."

Lewis Archer, testified for the defendant that he has been in the railroad business since 1882; that he is familiar with the construction and operation of the Buckner water glass. "It is a safe water glass with the guard glass in place. *With the guard glass out of place, it is one of the most dangerous things you could have on an engine, on account of that slot; when the glass breaks, it throws the glass out of that one place.* You can operate an engine, a locomotive, without

a water gauge with safety, by using the gauge cocks. I consider that the safest plan of operation."

J. B. Pendleton, an engineer of thirty-two years experience, testified that it is not safe to use a water glass without the guard glass; that he ran an engine 12 or 15 years without a water glass.

Motion to Dismiss for Want of Jurisdiction.

This motion was disposed of by the former opinion in this case, 233 U. S. 492, and by the repeated adjudications of the court that cases from the State courts involving the operation and effect of a Federal statute are reviewable on writ of error.

St. Louis Iron Mountain & Southern Ry. v. McWhirter, 229 U. S., 265.

St. Louis Iron Mountain & Southern Ry. v. Taylor, 210 U. S., 292.

Seaboard Air Line Ry. v. Duval, 225 U. S., 483.

It is the contention of plaintiff in error that it has been denied a proper construction and application of the Federal Employers' Liability Act, and the right to be shielded from responsibility under the act when properly applied, as shown by its exceptions based upon the following grounds:

1. Error in refusing to hold that upon all the evidence, plaintiff assumed the risk of injury as matter of law.

2. Error in refusal of the trial court to instruct the jury that upon all the evidence, plaintiff was guilty of contributory negligence.

3. Error in instructing the jury as to burden of proof on the issue of assumption of risk.

4. Error in instructing the jury on the measure of damages.

5. Error in the admission of testimony relating to report of defect by the plaintiff and promise by defendant to repair.

6. Error in requested instructions refused and instructions given by the trial court on the issues of negligence, contributory negligence and assumption of risk.

7. Error in the admission of testimony on the question of whether the plaintiff was furnished a proper way in which to gauge the steam in the boiler of the engine in addition to the gauge glass.

These assignments of error will be discussed more fully under appropriate heads in other parts of this brief.

The question of jurisdiction to review cases of this class has received the consideration of this Court in a recent opinion by the Chief Justice in which it is said:

"Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court, which was entered on the verdict of the jury, and if so, was error below committed, are the questions for decision.

"The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit, but also to properly light the roundhouse. If our jurisdiction attached, it can only be because the right to recover was based upon the act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But, as pointed out in *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S., 265, 275, 57 L. Ed., 1179, 1185, 33 Sup. Ct. Rep., 858, although the cause of action relied upon was based upon the Federal statute, nevertheless, "as it comes here from a State court, our power to review is controlled by Rev. Stat., Section 709 (Section 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Section 1214)) and we may therefore not consider merely incidental questions not Federal in charac-

ter; that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, 'the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. *Seaboard Air Line R. Co. v. Durrall*, 225 U. S., 477, 56 L. ed., 1171, 32 Sup. Ct. Rep., 790; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S., 281, 52 L. ed., 1061, 28 Sup. Ct. Rep., 616, 21 Am. Neg. Rep., 464. "The existence of jurisdiction to review under the principles just stated depends not merely upon form, but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the authority to examine and dispose of them."

Seaboard Air Line Ry. v. Padgett, 35 S. C. Rep., 481.

Motion to Affirm the Opinion and Judgment Rendered by the Supreme Court of North Carolina.

We do not feel that this motion is seriously insisted upon by the defendant in error. The questions presented by the writ of error are important to the plaintiff in error and were so regarded by the Supreme Court of North Carolina, as is illustrated by the dissenting opinion of Mr. Justice Brown, in which the plaintiff's right to recover damages under the Federal Act is denied in a strong argument well supported by the decisions of various State courts and of the United States Supreme Court. The questions presented are manifestly not frivolous. The fact that the decision is by a di-

vided court, should relieve the plaintiff in error of the charge that the questions are frivolous and that the writ of error is taken only for delay. (*Seaboard Air Line Railway v. Padgett, supra.*) We submit that an examination of the assignments of error will fully establish that the motion of defendant in error to affirm the judgment of the Supreme Court of North Carolina is without merit.

Motion to Transfer the Cause to the Summary Docket.

It will be difficult to present the questions involved in this case in the limited time allowed for argument of cases on the summary docket. It is true, the case has been heard by this court on a former writ of error, but the questions now presented were not argued at that time and were not decided by the court. For illustration, the issue of contributory negligence appeared in the former record to have been answered in favor of plaintiff in error. Therefore, no assignments of error were directed to any matters relating to that issue, for the obvious reason that it was not open to plaintiff in error to complain of any matter relating to an issue answered in its favor. The conduct of the last trial of this case varies in many particulars from the conduct of the trial under review by this court on the former writ of error. The evidence varies; the instructions requested and refused are different, and the charge of the court differs radically from that delivered by the former trial judge.

ARGUMENT.

Sufficiency of evidence to establish a cause of action or a defense under the Federal Employers' Liability is to be determined according to the rule of the Federal courts and not according to practice of the State courts.

The question of the sufficiency of evidence to establish a cause of action or a defense is not a matter of procedure, but goes to the very substance of the statute giving the right

to maintain the action. If this is not true, then the trial court, in the first instance, and the appellate court of the State by review, can say what evidence establishes negligence under the Federal Employers' Liability Act and what evidence does not establish negligence, and can say what evidence establishes the defenses available under this act, and their decision of the matter would not be subject to review by the United States Supreme Court, because in matters of procedure the practice of the State court is controlling.

We submit that the sufficiency of the evidence to be submitted to the jury is a matter for the determination of the Federal Courts according to the well established rule of such courts, and that it is not open to the State courts to adopt and enforce a different rule.

St. Louis I. M. & S. Ry. v. McWhirter, 229 U. S., 265.

The limitations upon the State courts in determining matters of substance in the name of procedure are defined by Mr. Justice Lamar in *Central Vermont R. Co. v. White's Adm.*, 35 S. C. Rep. 865, at page 867, as follows:

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel v. Holbrook*, 12 Pet., 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. *Phillips v. Grand Trunk Ry.*, 237 U. S.,; *Boyd v. Clark*, 8 Fed., 849; *Hollowell v. Horwick*, 14 Mass., 188; *Cooper v. Lyons*, 77 Tenn., 597 (2); *Newcombe v. Steamboat Co.*, 3 Iowa, 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a State which

gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the State court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. *Railroad v. Gladmon*, 15 Wall., 401 (1), 407-408; *Hough v. Railroad*, 100 U. S., 225; *Inland, &c. Co. v. Tolson*, 139 U. S., 551 (4), 557; *Washington, &c. R. R. v. Harmon*, 147 U. D., 581; *Hemingway v. Ill. Cent. R. R.*, 114 Fed., 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect approved in *Seaboard Air Line v. Moore*, 228 U. S., 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

It is said to be well settled that it is the duty of the trial judge to withdraw a case from the jury where the the evi-

dence is undisputed, or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it.

Randall v. Railroad, 109 U. S., 478.

Railroad v. Converse, 139 U. S., 469.

This rule has been applied by this Court in an action involving the defense of assumption of risk, where it appeared from plaintiff's evidence that he assumed the risk.

Butler v. Frazee, 211 U. S., 459.

"There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence, the proof which constitutes negligence. There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. *Union Pac. R. Co. v. McDonald*, 152 U. S., 262. The rule is thus announced in that case: 'Upon the question of negligence . . . the Court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court in the exercise of a sound judicial discretion will be compelled to set aside a verdict returned in opposition to it. *Delaware L. & W. R. Co. v. Converse*, 139 U. S., 469, 472, and authorities there cited; *South Chicago M. & St. P. R. Co.*, 150 U. S., 245; *Anderson County Comrs. v. Beal*, 113 U. S., 227.'"

So. Pacific R. Co. v. Pool, 40 L. Ed. U. S. S. C. Rep., 438.

"It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way."

Railroad v. Bank, 123 U. S., 727, 733.

Railroad v. Converse, 139 U. S., 469.

Upon all the evidence in this case, plaintiff assumed the risk of injury from the defective water glass as matter of law.

In his dissenting opinion, Associate Justice Brown, of the North Carolina Supreme Court, says:

"The decision of the United States Supreme Court leaves it open to us to say whether the plaintiff, as a matter of law, assumed the risk of injury from the defective water glass. That question was not passed upon, and if it had been, upon the facts as then presented, that would not prevent a consideration of the question upon this appeal when the facts showing assumption of risk are much stronger.

The United States Supreme Court reversed our judgment and remanded the cause for further proceedings not inconsistent with their opinion.

Mr. Justice Pitney states the law of this case as follows:

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time, specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinary prudent man under the circumstances would rely upon such promise." *Seaboard Air Line Railway v. Horton*, 233 U. S., 492.

Applying this rule to the undisputed evidence, I am of opinion that the plaintiff assumed the risk of injury and is not entitled to recover."

This question is raised by motion for judgment of nonsuit (Exceptions 19 and 36), and by exceptions to refusal of the trial court to give defendant's requests for instruction (Ex-

ceptions 38, 40, 41, 42, 43, 44, 45, 46, 47 and 65½), and by the charge of the court on the issue of assumption of risk.

Numerous decisions hold, as stated by the Supreme Court in this case (*Seaboard Air Line Ry. v. Horton*, 233 U. S., 492), that where the danger is so manifest that a reasonably prudent man would not risk it, a promise of repair will not relieve the plaintiff from assumption of the risk.

This proposition is fully discussed in *Roccia v. Coal Co.*, 121 Fed., at page 451, as follows:

“In the case of *District of Columbia v. McElligott*, 117 U. S., 622, the Supreme Court has expressed the doctrine which, in our judgment, sustains the instructions given to the jury by the Court below. In that case the plaintiff, who was in the employ of the district, was injured while at work on a bank of gravel. There was evidence tending to prove that he discovered that there was danger of the bank caving in, and went to the supervisor of the district for more men to do the work, and for one man to watch the bank, and that he received the information that such assistance would be sent. Before the assistance arrived the bank caved in, causing his injury. The Court said:

‘Assuming that the district might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so manifest as to prevent a reasonably prudent man from risking it upon a promise of assurance by the proper authority that the cause from which the peril arose would be removed.’

The Court then, after referring to the experience which the plaintiff had had in that kind of business, said:

‘And it was not implied in the contract between him and the district that he might needlessly or rashly expose himself to danger. On the contrary, if liability might come upon the District for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from per-

sonal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment—he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received.

“Here are expressed the extent and limit of the rules which control the questions now under consideration. First, if the workman expose himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, he assumes the risk of the danger which he knows and appreciates, and, if the danger be so obvious or threatening as likely to cause injury at any moment, he has no right to continue at such work in the expectation that promised assistance will be sent. This principle of law the decision formulates without qualification, and irrespective of what a reasonably prudent man would or would not have done under the circumstances. The opinion elsewhere goes further to say, in substance, that if the danger be not obviously threatening of present injury, but yet if it be so imminent or manifest as to prevent a reasonably prudent man from assuming it, even with the promise of assistance, the master will not be liable.”

“Where an employee knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer’s service in reliance upon the latter’s promise to remedy the defects which produced the danger.”

Railroad v. Watson, 114 Ind. Rep., 20.

“A compliance with a command from which it is evident to the servant that injury will likely result, and where to do so would be obviously rash, throws upon him the burden of assuming the risk. It is not the policy of
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the law that a person who wantonly places himself in a perilous situation, even though commanded by another to do so, can escape the consequences of his own negligence in so doing."

Attleton v. Bibb Mfg. Co., 5 Ga. App., 779.

"Where a miner of many years' experience saw a pot or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder."

Alteriac v. West Pratt Coal Co., 161 Ala., 435.

In the case of *McAndrews v. Railroad*, 39 Pac., 85, in which the plaintiff continued to use a defective hand-car which was likely to jump the track at any moment, the Supreme Court of Montana says:

"If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employee does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect."

The case of *Albrecht v. R. R.*, 108 Wis., 530, is very similar to our case in its main facts, and recovery was denied on the ground of the imminence of the danger. In that case a locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the engine, and receiving the engineer's promise to see that a shield is furnished, leaves the terminal station where the shield can be procured, and proceeds on a trip, knowing that

the promise has not been and cannot be fulfilled until the return, was held not entitled to recover.

"An experienced servant cannot recover if he continues, even for an hour or two to encounter the obvious and immediate danger of using a cracked saw to cut steel plates."

Erdman v. Steel Co., 59 Wis., 6.

There is no evidence that plaintiff was induced to run the engine in its dangerous condition by a promise to repair, and the defendant was entitled to the request for instructions covered by Exception No. 42. The sole evidence on this point is that of plaintiff, admitted over defendant's objection (Exceptions Nos. 4 and 5), that he ran the engine because of the conversation with Matthews. The cases hold that the promise to repair must have been the inducing motive for remaining in the employment. (See also Exception No. 65, Record, page.....)

Burden of Proof on Issue of Assumption of Risk.

The burden of proof is a matter of substance in which the State courts cannot follow their own practice and fix their own rules.

Central Vt. R. Co. v. White's Admx., 35 S. C. Rep., 865.

On this issue the court instructed the jury as follows:

"The burden of the second issue is upon the defendant, and the burden of the third issue is upon the defendant, and the defendant should offer you evidence to sustain the plea of contributory negligence and assumption of risk." (Exception No. 64, Printed Record, page)

This instruction is erroneous because it places upon the defendant the duty of offering evidence on the issues of contributory negligence and assumption of risk. It is not the

duty of the defendant to offer evidence on these issues. Conceding that the burden of the issue is on defendant, this burden can be sustained by evidence offered on behalf of plaintiff, without requiring defendant to offer evidence.

The court in various ways emphasized the charge that the burden of the issue of assumption of risk is on the defendant.

"If you answer the second issue 'Yes,' that he assumed the risk incident to his injury, the burden being upon the defendant to satisfy you of that by the greater weight of the evidence, you need not answer the third and fourth issues." (Exception No. 66, printed Record, page)

"The burden is upon the defendant to satisfy you that the plaintiff assumed the risk which resulted in his injury." (Exception No. 67, printed Record, page)

"The burden is upon the defendant to satisfy you by the greater weight of the evidence on the second issue that the plaintiff did assume the risk of his injury. If it has so satisfied you by the preponderance of the evidence, you will answer the issue 'Yes,' and unless they have so satisfied you, you will answer it 'No.'" (Exception No. 68, Printed Record, page)

While these may be correct instructions in the abstract, yet as applied to the facts of this case, they are not correct. The existence of the defect and the appreciation of the danger incident thereto being established by plaintiff's evidence, the burden was on plaintiff to satisfy the jury by a preponderance of evidence that he reported the defect and was given a promise of repair.

"A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience, and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objection as to

the hazards. *The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule.*"

Malm v. Thelin, 45 Neb., 686.

Requested Instructions on the Issue of Assumption of Risk which the Trial Court Refused to Give.

The defendant requested the court to instruct the jury as follows:

"If you find that the plaintiff reported the absence of the guard glass and was given a promise of repair, if you also find by the preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, the Court instructs you to answer the second issue as to assumption of risk, 'Yes.'"
(Exception No. 44, printed record, page).

This instruction was refused and defendant excepted. The correctness of this instruction is supported by the following language of Mr. Justice Pitney:

"When an employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or his representative an assurance that the defect will be remedied, the employee assumes the risk even though it arises out of the master's breach of duty.

If however, there be a promise of reparation, even during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinary prudent man under the circumstances would reply upon such promise."

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

While the trial judge read the foregoing quotation to the jury, he did so in a general way and did not specifically say to the jury how they should answer the second issue if the facts were found to be as set forth in defendant's request.

The requested instruction boils the matter down to the real question to be determined in considering the issue of assumption of risk. The absence of the guard glass was open and obvious and the danger known to and fully appreciated by plaintiff, according to his own testimony. There was nothing for the jury to find so far as these matters are concerned. Then, conceding a report of the defect and promise to repair (which is conceded in the requested instruction) it was correct to instruct the jury that if they should find by a preponderance of the evidence that no ordinarily prudent man under the circumstances would rely upon such promise, plaintiff assumed the risk and they should answer the second issue "Yes." Defendant was entitled to have the requested instruction, and as the charge actually given did not cover it, we submit there was error.

Seaboard Air Line Ry. v. Horton, *supra*.

The court, over defendant's objection and exception, modified defendant's request for instruction No. 11, by adding at the end thereof, "That is, relying on that promise, he continued to use the engine," as follows:

"If you find by a preponderance of the evidence that plaintiff appreciated the risk incident to the use of the guage glass without guard glass, the Court instructs you that under the Federal Employers' Liability Act, he assumed the risk and you will answer the second issue, Yes, unless the plaintiff has satisfied you by a preponderance of the evidence that he reported the absence of the guard glass and was given a promise of repair, and that he was induced by such promise to continue in the employment."

The court modified the instruction by adding at the end thereof: "That is, relying on that promise, he continued to use the engine." (Exception No. 45, Printed Record, page -----)

This instruction is correct without the modification.

"In order to bring his case within the doctrine of a promise to repair, the authorities are quite numerous to the effect that the promise must have been the inducing motive which kept the servant at work, and without which he would have quit; otherwise it is not binding."

Coin v. Lounge Co., 222 Mo., 1179.

R. R. v. Norman, 49 Ohio St., 598.

Note, 40 L. R. A., 793.

The Court Should Have Instructed the Jury that Plaintiff was Guilty of Contributory Negligence as a Matter of Law.

At a former trial of this case, the jury answered the issue of contributory negligence "Yes," when the evidence of such negligence, we submit, was much weaker than that appearing in this record.

Under the practice prevailing in North Carolina, when contributory negligence is established by plaintiff's evidence, it is the duty of the trial court to grant motion for judgment of nonsuit.

Strickland v. R. R., 150 N. C., 4;

Mitchell v. R. R., 153 N. C., 116;

Dunnevant v. R. R. (N. C.), 83 S. E., 347

But under the Federal Act, it would not be proper to order a nonsuit because contributory negligence is not a bar to the action, but goes in diminution of damages under Sec. 3. It would, therefore, be the duty of the court, where it appeared from plaintiff's evidence that he was guilty of contributory

negligence, to direct the jury to answer that issue "Yea." We submit that the defendant was entitled to such an instruction in this case and the Court committed error in refusing to give it. (Exception No. 39, Printed Record, page)

"Though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

Elliott v. R. R., 150 U. S., 245;

Aerkfetz v. Humphries, 145 U. S., 418;

Schofield v. R. R., 114 U. S., 615;

R. R. v. Houston, 95 U. S., 697.

An experienced workman is guilty of contributory negligence in continuing to work in a sand pit where the gravel and sod at the summit were permitted to overhang the base, and thus render the upper part of the bank liable to fall upon the man working below, notwithstanding the promise of the foreman, "I will secure the bank in a day or two, and I will warrant you that nothing will happen to you."

McCarthy v. Washburn, 58 N. Y. Supp., 1125.

"Where the condition of premises whereon an employee is set to work is such that danger is obvious to him as well as to the employer, the latter's assurance, when his attention is called to it, that at some future time the defect will be remedied, does not absolve the employee from the charge of contributory negligence in proceeding with his work."

Hannigan v. Smith, 50 N. Y. Supp., 845.

**The Court's Definitions of Contributory Negligence
are Erroneous.**

The court, over the objection and exception of the defendant, instructed the jury as follows:

"Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." (Exception No. 57, printed record, page).

"Contributory negligence arises when the plaintiff as well as defendant has done some act negligently or has omitted through negligence to do some act, which it was their respective duty to do, and this combined negligence produces the injury." (Exception No. 58, printed record, page).

In connection with the court's definition of contributory negligence must be considered the following references to proximate cause:

"And it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exertion of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. It is not every negligence that is actionable, but I repeat, it becomes actionable when it is the proximate cause of the injury, either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care, an ordinary prudent person would have foreseen that such consequence would likely be produced thereby. (Exception No. 53, printed record, page).

"The law is, that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although

he could not anticipate the particular injury that did happen. Consequences which flow in unbroken sequence, without an intervening cause from the original negligent act are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular result which did follow." (Exception No. 53, printed record, page -----).

"The first requisite of proximate cause is the doing or omit second that it did not actually produce it."

(Exception No. 55, printed record, page -----).

We submit that it is not essential that the negligence of the employee shall be a proximate cause of the injury in order to constitute negligence in the sense that term is defined by the court. In this case it was contended by the defendant the plaintiff's contributory negligence, upon one phase of the evidence, consisted in continuing to work in the presence of a known danger, and that it was not the result of any act on his part which could be a proximate cause of the injury in the sense that term is used by the court.

The instructions emphasize the necessity that there must have been some active negligence on the part of the plaintiff, which seriously prejudices the position of defendant that by merely remaining at work under the circumstances he was guilty of contributory negligence.

There has been no negligence on the part of the defendant.

This question is raised by motion to nonsuit (Exceptions Nos. 19 and 30), and by exception to the judge's charge, and also by refusal of the court to give the following instruction requested by the defendant:

"The burden of proof is upon the plaintiff, J. T. Horton, to show that the water glass was defective and that the defendant knew of the defect, and unless you so find by the

greater weight of the evidence, you will answer the first issue 'No.'” Exception No. 48.) This question is also presented by refusal to give other requested instructions. (Exceptions No. 48, No. 49, No. 50, and No. 56.)

It is not sufficient merely to prove that the plaintiff was injured through a defective water glass, but it must be shown that the defendant knew of the defects, or by reasonable care ought to have known of them.

Railway v. Barrett, 166 U. S., 617.

Patton v. Railroad, 179 U. S., 658.

Railroad v. McDale, 135 U. S., 554, 570.

The law does not deny the master the right to make rules and regulations for the proper conduct of his business, and a rule requiring the servant charged with the care of a machine to inspect it and report defects is a proper exercise of the master's right.

It was the plaintiff's duty in this case to inspect his engine and report all defects in writing. But, without considering his duty to inspect, *the plaintiff had knowledge* of the absence of the guard glass, and even without a rule of the defendant, it was his duty to report it.

At the end of each of three round trips made by plaintiff on this engine he made a written report in compliance with the defendant's rules; each time he noted necessary repairs to his engine, and in every instance he made no reference to the absence of the guard glass.

The form upon which plaintiff was required to make application for repairs to the engine will be found in the record.

From the undisputed evidence it appears that the defendant had established a specific method by which defects in an engine should be reported by the engineer having charge of it, and that this method was reasonable. The plaintiff, in compliance with this rule, made the required reports at the end of his trip, and on three successive reports omitted the fact that the guard glass was missing and failed to ask that

this defect be remedied. Had he reported the defect as he was required to do, the master would have supplied the remedy. Certainly a servant cannot complain of an injury directly attributable to his own failure in the performance of his duty. Notice of the defect is essential to charge the master with liability in this case, and the defendant was entitled to notice in accordance with its prescribed rules. This is not a question of contributory negligence in the violation of the rule. Compliance with the rule by the servant is necessary to establish a duty on the part of the master to repair the defect. If the failure to make the report was the result of negligence on the servant's part, the servant should suffer, and not the master. Horton's injury resulted from his own disobedience of the defendant's rules, and he has failed to establish any negligent omission of duty on the part of the defendant.

Holland v. Railroad, 143 N. C., 435.

Whitson v. Wrenn, 134 N. C., 86.

Stewart v. Carpet Co., 138 N. C., 60.

The plaintiff was aware of the danger in using this water-glass without a guard. The absence of the guard, which the plaintiff said was put on the glass for the protection of the eyes of the engineer, was in itself sufficient notice that it was dangerous to use the glass without the guard.

By using the glass, under the circumstances, plaintiff signified a willingness to assume the risk, and brought himself within the maxim, "*Volenti non fit injuria*"; and, having willingly assumed the risk, the defendant's omission, if any, does not become actionable negligence.

Two circumstances are important to be considered upon the question of plaintiff's *willingness* to assume the risk: (1st) He continued to work in the face of an appreciated danger. (2d) He had conveniently at hand a means by which he could have obviated the danger, and failed to make use of it.

In another view of the case, plaintiff has failed to show that the defendant has been guilty of any negligence of which he can complain. There was open to him a way to operate this engine which was perfectly safe—that is, by cutting off the water glass and using the gauge cocks, as pointed out above. His failure to adopt the safe course was the sole proximate cause of the injury, and is attributable to the plaintiff's own fault.

The defendant contends that the plaintiff has failed to show negligence on the part of the defendant, because:

(1) He has failed to establish any duty to repair, in view of his failure to show notice of the defect.

(2) He was willing to take the risk of injury.

(3) His use of a defective glass, when he had at hand a safe way to operate the engine, was the sole cause of his injury.

(1) No Notice of Defect.

"In an action for personal injuries, while defendant has the burden of proof of contributory negligence, plaintiff must establish grounds of defendant's liability; and to hold the master responsible, the servant must show by substantial proof that appliances furnished were defective, and knowledge of the defect or some omission in regard thereto."

Looney v. Railroad, 200 U. S., 480.

It is a principal of general application that the master must be fixed with notice of a defect in his appliances to create liability in favor of an employee who, with knowledge of the defect, has been injured thereby.

Hudson v. Railroad, 104 N. C., 499.

Blevins v. Cotton Mills, 150 N. C., 493.

Labatt on Master and Servant, Sec. 119 *et seq.*

(2) Volenti non fit Injuria.

As to the class of risks arising subsequent to the contract of employment, two views of the principle upon which the master shall be relieved from liability have been expressed by the courts:

1. That such risks enter into and become part of the implied contract of service and are assumed by the servant as incident to the business as conducted.

2. The servant, by continuing in the service with knowledge of the danger and without complaint and promise to repair, consents to the continuance of the danger, thereby waiving the right to require of the master suitable tools and appliances in proper repair.

Whether the one or the other view is adopted as the true basis of the defense, the weight of authority seems to support the conclusion that where a servant enters into or remains in employment with knowledge of the danger, and contracts or consents to take the risk from a danger known to and appreciated by him the master does not owe that servant any duty to remedy the dangerous condition, and is not guilty of negligence in failing to do so.

See cases cited *infra*.

The judgments of distinguished jurists sustain the view that evidence which shows that the servant had knowledge of the defect and appreciated the risk, and that this appreciation was attended by circumstances which make a proper case for the application of the maxim, "*Volenti non fit injuria*," establishes that the master has been guilty of no breach of duty in exposing the servant to the risk. The application of the maxim, in a proper case, makes necessary a negative response to the issue of negligence.

Lord Bowen, in *Thomas v. Quartermaine*, L. R., 18 Q. B. Div., at page 695, gives an explanation of this doctrine, which Mr. Labatt calls "admirably lucid and forcible."

"If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendant."

Smith v. Baker, 60 L. J. Q. B. N. S., 683.

O'Malley v. Gas Light Co., 158 Mass., 135; 47 L. R. A., 161.

Thomas v. Quartermaine, L. R. 18 Q. B. Div., 615, 697.

Katalla v. Rones, 186 Fed., 30.

Worden v. Gore-Meehan Co. (Conn.), 78 Atl., 422.

"No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur."

St. Louis Cordage Co. v. Miller, 126 Fed. Rep., at p. 525, and cases cited at p. 511.

Thompson on Negligence, Sec. 412.

Lord Bramwell says: "I hold that where a man is not physically constrained, when he can at his option do a thing or not, and he does it, the maxim applies. What is '*volens*'? Willing. And a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwilling, with no good will; but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone."

Membrey v. Ry. Co., 14 App. Cases, at p. 187.

(3) Plaintiff's use of a defective glass, when there was available a safe way to operate the engine, was the proximate cause of his injury.

"If there are two or more ways or appliances to use to perform a given duty, and the employee selects voluntarily the more dangerous way or appliance, in case of a resulting injury, the employee will be held to have assumed the risk, and there will be no liability on the employer's part."

White's Personal Injuries on Railroads, Sec. 858.

"Where there is a safe and a dangerous method available for the performance of the work in hand, and the servant selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover."

Covington v. Furniture Co., 138 N. C., '74.

Dermid v. Railroad, 148 N. C., 183.

Bryan v. Lumber Co., 154 N. C., 485.

In the *Covington case*, Mr. Justice Connor says the plaintiff "should not have taken chances in the presence of an obvious, apparent and well-known danger; if he did so, and was hurt, he cannot cast upon the employer the blame or responsibility."

Cooperage Co. v. Headrick, 159 Fed., 683.

"All persons are expected to exercise ordinary care and prudence in their dealing with their fellows; consequently, he who has the last clear chance to avoid and prevent an injury, and does not exercise reasonable care and prudence to do so, is himself responsible for it, for his negligence is the immediate and nearest cause."

Brown, J., dissenting, in Pressly v. Yarn Co., 138 N. C., 430.

Horton was furnished with a safe and suitable engine, having upon it instrumentalities for determining the amount of water in his boiler which were sufficient for the purpose, and which were in good order. If the defendant failed to furnish this engine with a water glass which was approved and in general use, the plaintiff cannot complain, because such failure was not the cause of the injury to the plaintiff. Horton was aware of the fact that two approved methods of measuring water had been adopted and attached to the engine; he was aware of the fact that one of these methods was in a dangerous condition; and the witnesses say it was Horton's duty to have used the safe method under such cir-

cumstances. It follows, therefore, that the plaintiff's injury did not result from the breach of any duty owed by the defendant, but from his own primary negligence, *not contributory negligence*, in using the defective instrumentality.

Again, the defendant contends that upon the broad principle expressed in the maxim, "*Volenti non fit injuria*," the plaintiff should be denied the right to hold the defendant responsible for his injury.

In our position on this point, the present case is somewhat analogous to *Jones v. Tobacco Co.*, 141 N. C., 202. There the court says that if the defendant furnished plaintiff a hood, or screen, for the plaintiff's protection from a running saw, and plaintiff failed to use it, there would be no negligence on the defendant's part of which plaintiff could complain.

The plaintiff in this case has simply done something which his duty required him not to do. He substituted his own will for that of his employer. "No man," says Justice Walker, in *Whitson v. Wrenn*, 134 N. C., 86, "by his own volutary and wrongful act, can impose a liability on another, nor will be permitted to take advantage of his own wrong and wilfulness."

Exceptions to Instructions on Issue of Negligence.

The court, over defendant's objection and exception, instructed the jury as follows:

"They, as I understand the decision, and as I charge you the decision is, hold it is not the duty of the railroad company, not an absolute duty that the railroad company owes to a servant to furnish an absolutely safe place, or absolutely safe and secure tools and appliances and equipment with which to do his work, but that the rule is that the railroad company shall exercise ordinary care and prudence to the end that—I want to use the exact language—to the end that the tools and the appliances of the work may be safe for the workmen. The

Supreme Court of the United States says that the common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman.

It is the duty of the employer to exercise due care in respect to providing a safe place of work and suitable and safe appliances for the work." (Exception No. 51, printed record, page).

The rule as stated and adopted by the United States Supreme Court is that it is the master's duty to exercise due care in respect to providing a reasonably safe place to work.

"To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employee is discharged when, but only when, its agents whose business it is to supply such instrumentalities, exercise due care, as well in their purchase originally as in keeping them in such condition as to be reasonably and adequately safe for use by employees."

Hough v. Railroad, 100 U. S., at page 218.

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

R. R. v. McDade, 135 U. S., at page 570.

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ."

R. R. v. McDade, 195 U. S., 64.

The obligation of the master is to exercise *reasonable* care to furnish *reasonably* safe tools and a *reasonably* safe place.

O'Hara v. Machine Co., 117 Fed., 349.

Chambers v. Everding & Farrell, (Or.) 143 Pac., 616.

R. R. v. Townes (Okl.), 143 Pac., 615-53.

Erroneous Instruction on Issue of Damages.

The court, over defendant's objection and exxception, instructed the jury as follows:

"The rule is that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's negligent act, and this may embrace indemnity for actual expense incurred, in nursing, medical attention, loss of time, loss of money and actual suffering of body or mind, which are the immediate and necessary consequences of his injury. You will consider bodily pain and suffering occasioned by the injury, if any resulted from said injury, and in case you find that the plaintiff has not yet recovered from said injury, or that he has been permanently disabled, then you will take such facts and circumstances into consideration in estimating the damages, to which you may add such amount in your sound discretion as that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of. That is the rule." (Exception No. 69, printed record, page -----).

The error in this instruction of which the defendant complains, consists in stating the elements of damages to which plaintiff was entitled and the saying "*to which you may add*

such amount in your sound discretion as that you may think from the evidence will be compensation for the injuries that are purely and plainly the consequences of the injury complained of."

We submit that this is an erroneous statement of the measure of damages and permits the jury to form an estimate of the damages according to the correct rule and then add to such amount something additional for the injuries complained of.

That an erroneous instruction on the issue of damages, in an action based upon the Federal Employers' Liability Act, is sufficient to sustain a reversal, is established by the following cases:

Norfolk & W. R. Co. v. Holbrook, 35 S. C., Rep. 143;
Kansas City S. R. Co. v. Leslie, 35 S. C., Rep. 844.

Exceptions to Evidence.

The plaintiff was permitted to testify that he told Powie Matthews, defendant's day round-house foreman, that the guard glass was gone, and asked if he had any of them and he said they did not have any, and did not keep them in stock; that they were in Portsmouth and he would send to Portsmouth and get one; that he said further: "You will have to run her like she is." This evidence was admitted over defendant's objection and exception. (Exceptions 1, 2 and 3, Printed Record, page)

It is not alleged in the complaint that plaintiff reported the absence of the guard glass, either verbally or in writing, and was given a promise of repair.

In a verified amendment to the complaint, plaintiff alleges that this water glass was "imperfect, defective, dangerous and unsafe in the following particulars, which were also known to the defendant, and by it negligently allowed to continue and exist, to-wit: In that the same had no guard glass or shield in front thereof, and in connection therewith." (Printed Record, page)

Having alleged that the water glass furnished him was defective and unsafe and that he was operating his engine with the water glass in that condition, and when he was fully aware of its condition, the burden rested upon plaintiff to establish the fact that he reported the defect and received a promise of repair. This was an issuable fact.

In the absence of allegation, proof of these facts was incompetent.

"A servant must either aver his want of knowledge of the defect which caused the injury, or that, having such knowledge, he informed the master and continued in the employment upon a promise, express or implied, to remedy the defect."

Railroad v. Norman, 49 Ohio St., 598;

Griffiths v. Docks Co., 13 Q. B. Div., 259.

"Evidence tending to show that defective machinery was used under a promise by the master to remove the defect, *held* inadmissible where such promise had not been pleaded."

Malm v. Thelin, 37 Neb., 686.

On redirect examination, plaintiff was asked:

Q. I ask you if it was a proper thing for an engineer to do?

Objection by the defendant.

Q. Compare to the jury, if you can, the danger or safety of running an engine with the water glass closed and with the gauge cocks, depending upon the gauge cocks, and running without a shield on the water glass?

Objection by the defendant. Objection sustained for the reason that this has been over on both the direct and cross examinations.

By Mr. Simms (counsel for plaintiff): Does your Honor understand that it is in the record that it is more dangerous to attempt to run it with the gauge cocks than with the water glass?

By the court: Yes, he said that, because they would stop up.

To the foregoing statement, defendant in apt time objects. (Printed Record, page.....)

The harmful effect of this statement seems to us to be manifest. The defendant alleged that the plaintiff was guilty of contributory negligence because he used a dangerous method of gauging the water in the boiler, by using the gauge glass without the shield when he had at hand a safe way of doing this work. The defendant contended that it was the plaintiff's duty as a reasonably prudent man to cut off the water gauge and use the guage cocks. This position could not be met by more potent evidence than that suggested in this question, and the statement of the court, that it was more dangerous to attempt to run the engine with the water glass closed and with the guage cocks than with the water glass in its defective condition. If that fact should be found by the jury, then the defendant's contention on the issue of contributory negligence would be destroyed.

We have searched the evidence of the plaintiff with great care and have been unable to find any statement that it was more dangerous to attempt to run the engine with the gauge cocks than with the water glass because they would stop up. His evidence on this point which will be found in the record, is as follows:

"Yes, you can operate an engine without a water gauge, but with the water cocks, but not as well. You cannot keep these cocks open. They are liable to stop up, but a water glass has got so much bigger opening here than the gauge cock. They are the safest things at all, as they do not stop like the gauge cocks, like all of the gauge cocks I have seen. I have run an engine many a time with the gauge cocks stopped up. Yes, you can run an engine with the water glass and with the gauge cocks if they stay open. I could have run this engine without the water glass and with the gauge cocks if they were in working order. Were they in

working order or not? My opinion one of them possibly was working all right. I think possibly a little steam would come out of them." (Printed Record, page)

It will be noted that when plaintiff says that water gauge glasses are "the safest things at all," he is referring to such glasses with the guard glass in place. He testified repeatedly that the gauge glass without the guard was *dangerous*. He said: "Yes, it is dangerous to run it without a guard glass. You see the tube might explode. The guard glass is put ther to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with that Buckner water gauge." (Printed Record, page)

The statement of the court, we submit, is not supported by the evidence, and, as an inference, is not justified by the testimony of the plaintiff. When the court, to whom the jury look for guidance in all things connected with the trial, stated that plaintiff had testified that the gauge cocks were more dangerous than the defective water glass, an impression was made on the minds of the jury which was impossible for the defendant to eradicate. We earnestly submit that this statement by the court was so prejudicial as to entitle the defendant to a reversal of this judgment.

Plaintiff's witness, Ernest Horton, was permitted to testify as follows:

Q. What would be the proper thing to do, or would it be the proper thing in the event there was no guard glass on the water gauge to shut off the water glass and run the engine with the gauge cocks?

A. I ran an engine over there for four years and I never shut the glass off.

Objection by the defendant, asking that this be stricken out.

By the court: He is asked what is the proper and safe way to do.

By the witness: The proper way in my opinion would be to run with the water glass turned on.

We submit that it is incompetent to permit this witness to testify as to what he did with respect to shutting off the water glass. In the first place, there is no evidence that conditions were similar. There is nothing to show that he was using a Buckner gauge and no evidence that the water glass he was using was of a dangerous character. The purpose of this evidence is to show that the plaintiff was acting the part of prudence in using the defective water glass. This witness did not qualify as an expert, and his opinion of what was proper was incompetent.

Exception to Refusal to Grant New Trial for Newly Discovered Evidence.

Defendant moved for a new trial for the newly discovered evidence of C. E. Barrow, who would testify that he, the said Barrow, married the sister of James T. Horton's mother, and lived within about three miles of the Horton home, near Youngsville, N. C., twenty-five or thirty years ago; that he remembers distinctly that said Horton's eye was injured when he was a boy; that the said eye has been injured ever since the said time; that he saw the injured eye at the time and it is the same eye he now claims to have been injured by the railroad; that he was told by Horton at the time that his eye was hurt by a knife striking it; that the knife was in the hands of one of his brothers and struck him in the eye while they were tusseling. (Exception No. 75 of the record, page.....)

This motion was supported by affidavit of defendant's counsel setting forth the statement of C. E. Barrow. (Printed record, page)

The value of this evidence to the defense is manifest. The court refused to order a new trial because, in his opinion, the proposed evidence was merely cumulative. (See order,

record, page) An examination of the evidence, we think, will disclose that there is no similar evidence in the record.

We earnestly submit that this evidence would have had a most important bearing on this case.

Formal Exceptions.

Exceptions No. 70, 71, 72, 73 and 74 are formal and are covered by the discussion of other exceptions herein.

Respectfully submitted,

MURRAY ALLEN,

Attorney for Plaintiff in Error.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

} No. 541

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH
CAROLINA.

MOTION ON BEHALF OF JAMES T. HORTON, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA; AND, IF THE COURT SHOULD DESIRE TO HEAR ARGUMENT, TO TRANSFER SAID CAUSE TO THE SUMMARY DOCKET.

Comes now the Defendant in Error, James T. Horton, by his counsel, William C. Douglass and Clyde A. Douglass, appearing in his behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herewith.

The Defendant in Error further moves the Court to affirm the opinion and judgment rendered by the Supreme Court

of North Carolina, upon the ground that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. If the Court should desire to hear argument, then the Defendant in Error further moves the Court to order this cause transferred to the summary docket provided for by this Court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

The grounds of these motions, the statement of the case, facts and argument are more fully set forth in the briefs accompanying the motions, all of which is herewith submitted.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

Notice to Seaboard Air Line Railway.

To Seaboard Air Line Railway, Plaintiff in Error:

Please take notice that on the day of October, 1915, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Attached hereto are copies of the motions to dismiss and affirm, the briefs and arguments to be submitted in support thereof; and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1915.

SEABOARD AIR LINE RAILWAY,

Plaintiff in Error,

v.

JAMES T. HORTON,

Defendant in Error.

} No. 541

**DEFENDANT IN ERROR'S BRIEFS ON MOTIONS TO
DISMISS THE WRIT OF ERROR FOR WANT OF
JURISDICTION, AND TO AFFIRM THE JUDGMENT
OF THE STATE COURT.**

This case has been before the Supreme Court of North Carolina three times on appeal, and once before this Honorable Court on Writ of error from the Supreme Court of North Carolina. (*Seaboard Air Line Railway v. J. T. Horton*, 233 U. S., page 492.)

It will be found upon examination that practically every exception presented in the present appeal has been passed upon in the case of *Seaboard Air Line Railway v. Horton*, *supra*, and that the trial court below has carefully followed the opinion of this Court.

The matters submitted to the jury were largely questions of fact, and have been determined by the jury under a charge free from error, and the judgment should be affirmed.

Again, the Defendant in Error contends that the Plaintiff in Error has been denied no right, privilege or immunity

under the statute; that there is no federal question involved herein that has not been determined by this Court, and the action should be dismissed for want of jurisdiction.

BRIEF OF DEFENDANT IN ERROR ON MERITS.

STATEMENT OF CASE.

This was an action instituted and tried, under the Federal Employers' Liability Act, in the Superior Court of Wake County, North Carolina, for personal injuries sustained by the Defendant in Error, who was a locomotive engineer in Plaintiff in Error's employment. The sight in his right eye was impaired by a scar left from a wound caused by an explosion of a water-glass on one of the Plaintiff in Error's locomotive engines.

This cause was before this Honorable Court at the October Term, 1913, on writ of error to the Supreme Court of North Carolina; and the opinion and judgment theretofore rendered by said State Supreme Court was reversed in an opinion delivered by Mr. Justice Pitney, 233 U. S., at page 492, and the cause was remanded to said State Court. The cause was thereafter retried in the Superior Court of Wake County, and a judgment rendered in favor of the Defendant in Error in the sum of \$4,500, from which judgment the Plaintiff in Error appealed to the Supreme Court of North Carolina. The said judgment was affirmed by the said State Court in opinions delivered by Chief Justice Clark and Justice Walker, on the 12th day of May, 1915 (page . . of the record); and the said cause is now before this Court on a Writ of Error allowed the Plaintiff in Error by the Chief Justice of the Supreme Court of North Carolina.

The attention of the Court is called to the fact that the Plaintiff in Error has brought forward in its assignments of

error for the consideration of this Court every exception which it carried to the Supreme Court of North Carolina. Many of these exceptions were abandoned by the Plaintiff in Error in the trial in the Supreme Court of North Carolina. Rule No. 34 of the Supreme Court of North Carolina provides as follows:

"Exceptions in the record not set out in appellant's brief or in support of which no reason or argument is stated or authority cited will be taken as abandoned by him."

In the brief of the present Plaintiff in Error filed by it in the Supreme Court of North Carolina the following exceptions in the record of the State Supreme Court were not set out, nor was there in said brief any reason or argument stated in support of the same nor any authority cited in support of the same, to wit: Exceptions Nos. 4, 5, 8, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 52, 56, 64, 65, 65-1-2, 67, 68 and 69.

The Defendant in Error insists upon and does not waive its rights arising under the said abandonment by the Plaintiff in Error of said exceptions, and, therefore, in his brief in this Court he will argue only those assignments of error growing out of exceptions which were not so abandoned in the Supreme Court of North Carolina.

BRIEF.

The trial Judge in the court below very carefully followed the decision of the Supreme Court of the United States (*Seaboard Air Line Railway v. Horton, supra*), and, strange as it may seem, the Plaintiff in Error notes five exceptions, to wit, 59, 60, 61, 62 and 63, to the action of the Court in read-

[NOTE.—The references in this brief are to marginal pages of the record.]

ing to the jury the decision of the Supreme Court of the United States, or certain portions thereof.

The Defendant in Error starts out with the assumption that it had no notice that the guard glass was gone from the engine. The Court will note that the Defendant in Error, Horton, testified as follows:

"I toid Powie Matthews that the guard glass was gone and asked him if he had any of them. He was the day roundhouse foreman and he said no, they did not have any here" (page 28 printed record). "I told him the guard glass to the water glass was gone and he said they did not have any and did not keep them in stock and they were in Portsmouth, but he would send to Portsmouth and get one. He said you will have to run her like she is."

The Plaintiff in Error's witness, Powatan Matthews, testified (page 67 of the record):

"I was asked the question as to whether Mr. Horton reported the absence of that glass and said I do not remember, and I do not. That is as far as I go and is as far as I know. *I do not remember. I do not deny it.*"

We submit that this evidence clearly and absolutely brings the Defendant in Error's case within the rule recognized and declared by the courts and text-book writers generally, upon the question of assumption of risk, and also brings this case directly within the language used by the Supreme Court of the United States in this very case at bar.

We rely upon this evidence to refute the Plaintiff in Error's contention that it had no knowledge of the absence of the guard glass.

As to the contention of the Plaintiff in Error, "That it was the Defendant in Error's duty in this case to inspect his en-

gine and report all defects in writing," the Defendant in Error contended and offered evidence to the effect that the guard glass was a mere *supply* which could be obtained by application to the foreman or storekeeper, and was not such a part of the *equipment* as was required to be placed in the work report. See evidence of Defendant in Error, pages 29, 36 and 46.

Testimony of Ernest Horton (page 119 of the printed record) and also testimony of Edgar W. Barbee, witness for the Plaintiff in Error, who, among other things, testified as follows:

"As to the duty of an engineer in respect to obtaining a guard glass or flag or torpedoes, fuses or anything of that nature or oil cans, from a storeroom, I would tell the foreman I did not have it. It was customary to send a fireman for it. The requisition would come from the foreman. The foreman would send the article to me. I would put it in myself. You would drop it in just like you put a quarter in a slot machine. Yes, they do pay attention to verbal requests. Yes, you can that way send your fireman and get a guard glass if they have them in stock," pages 81, 82, 83 of the printed record.

J. A. Massey, witness for the Defendant in Error, on page 58 of the record testified:

"I know who applied for them (guard glasses), the engineers did. They would apply to the master mechanic, general foreman or the foreman. The glass in the Buckner Glass was a *supply*. I had charge of the storeroom. I did not have any Buckner water guard glasses in stock down there on August 4, 1910. I did not have any between July 27th and August the 4th."

Witness further testified, on pages 60 and 61 of the printed record:

"That if the engineer wanted a lamp, or flag, or a torch, or torpedoes or a piece of glass to drop into one of these guards he would report it over to the master mechanic, or the general foreman, or the foreman and ask him for a requisition for whatever article he wanted and bring that requisition to the storeroom, and he would get that directly and not through the written report of the engineer for repairs."

So that the jury were fully justified in finding that the Defendant in Error was not required, either by the rules or the custom and practice, to note the missing guard glass in his work report, and that he fully complied with the rules, practice and custom in reporting its absence to Matthews, the roundhouse foreman.

The object in making out a "work report" was to have certain *repairs* made on the locomotive, but the rule, practice and custom was, to make demand for *supplies* such as guard glasses, etc., of the foreman, as was done by the plaintiff in this case.

The Plaintiff in Error ignores the Defendant in Error's theory and evidence in the case and assumes, "First, that the Defendant in Error continued to work in the face of an appreciated danger. Second, that he had conveniently at hand a means by which he could have obviated the danger, and failed to make use of it."

As to the first proposition, the Defendant in Error testified on page 35 of the printed record:

"I did not say with pressure on that tube in the glass case that that glass is liable to explode at any time. No, that is not so. I have run those a year without their exploding."

The witness further testified on page 45 of the printed record:

"No, I did not know if it did explode without the guard glass that it would be liable to hurt the engineer as I have seen lots of them explode without hurting the engineer."

The witness Ernest Horton, on page 119 of the printed record, in referring to the water glasses, testified as follows:

"They may last a day, a week, a month, or a year and it may last an hour or shorter."

We contend that under the evidence in this case it was purely a question for the jury as to whether or not the Defendant in Error continued to work in the face of an appreciated danger.

As to the second proposition the Defendant in Error testified as follows on page 43 and page 45 of the printed record:

"Yes, you can operate an engine without a water gauge, with water cocks, but not as well, as you can not keep these cocks open. They are liable to stop up. But a water glass has got a so much bigger opening here than the gauge cock. They are the safest things at all as they do not stop up like the gauge cocks, like all of the gauge cocks I have seen. I did not attempt to cut it off. I needed it. I did not attempt to run my engine without it."

Ernest Horton, a witness for the Defendant in Error, in response to the following question:

"Would it be the proper thing, in the event there was no guard glass on the water gauge, to shut off

the water glass and run the engine with a gauge cock?" testified on page 113 of the printed record: "The proper way, in my opinion, would be to run with the water glass turned on."

This question was answered, and then the witness was asked this question by the Court:

"What is the proper and safe thing to do?" and the witness answered: "The proper way, in my opinion, would be to run with the water glass turned on."

This was also a question solely for the jury and they were fully justified in finding that the danger was not so imminent that the Defendant in Error should have ceased to operate the water glass, and that he was fully justified in continuing its use instead of using the gauge cocks.

We come now to the Plaintiff in Error's proposition, "That the Court should have instructed the jury that Defendant in Error was guilty of contributory negligence as a matter of law."

The Plaintiff in Error bases this solely upon the proposition that the Defendant in Error, as the Plaintiff in Error contends, continued to work in the presence of a danger which was so imminent and obvious that his conduct in so doing constituted contributory negligence. In the case at bar the testimony is conflicting as to the imminence and obviousness of the danger of using the water gauge without a guard glass. This has been somewhat referred to in an earlier part of this brief. It should not be overlooked that the Defendant in Error testified that such water glasses were sometimes used for a year at a time without exploding, and that the witness Ernest Horton testified to similar effect, and that the Plaintiff in Error's witness, Wright, gave substantially similar testimony. Moreover its witness, Dave Campbell, testified:

"I have not had one to explode with me in the last year to my knowledge." And said witness further testified: "In case it does not leak I do not shut it off" (page 75 of record).

And there was no evidence in this case that this water gauge was leaking before the explosion. The witness Edgar W. Barbee, on page 81 of the record, testified:

"Yes, it is true that engineers on the Seaboard ran their engines out with the water glass without cutting it off, with the guard glass missing, prior to the time Mr. Horton was injured."

And that from this and much other testimony it was apparent that not only one, but many trips might be safely made with a water gauge unprotected by a guard glass or shield. The pregnant circumstance in addition to this which was in evidence, and for the jury's consideration, was the fact that the fireman, Benton, a witness introduced by the Plaintiff in Error, testified that he knew that the guard glass was broken; that in fact he was the man who broke it as he started out on the first trip with the Defendant in Error in using his engine, and that he did not call it to the Defendant in Error's attention, and that he sat immediately in front of the water gauge on the whole of the first trip to Aberdeen and the return trip from Aberdeen to Raleigh, and that he made the second trip also, and likewise fronted the same unprotected water gauge, and did it again upon the return trip, and that he made the third trip from Raleigh to Aberdeen and again faced the unprotected water glass, and that this explosion and injury to the Defendant in Error occurred upon the return part of his third trip from Aberdeen to Raleigh, and that he did all of this without objection and without testifying that he felt any danger in so doing.

The jury were certainly justified in finding, upon the

Plaintiff in Error's introduction of, and voucher for, this witness, that he was an ordinarily prudent person, careful for his own safety and having knowledge of the risk of so using the water gauge, and they might, from this evidence and fact alone, have been justified in concluding that the Defendant in Error did not work in the presence of a danger so obvious and imminent as that no man of ordinary prudence would have done so.

Let it not be overlooked that as a matter of fact the guard glass made two trips out of three, or five half-trips out of six, unprotected by the glass or shield, and without exploding or injuring the Defendant in Error or his fireman, Benton.

The further fact should be noted: That, according to the evidence, the roundhouse foreman of the Plaintiff in Error, after knowledge that the water gauge had no guard glass, instructed the Defendant in Error to continue to use the engine in that condition, and the jury might well have concluded that certainly this experienced and superior employee of the Plaintiff in Error had as much knowledge and care as an ordinarily prudent person would under such circumstances be required to exercise.

Can it be seriously contended, in view of this evidence and much more of similar import, that this was not a pure question of fact for the jury?

Exceptions 6 and 7, Pages 31 and 32.

This was not opinion evidence as Plaintiff in Error contends, but was purely an answer as to a fact well known and best known to the plaintiff. He had had long experience as an engineer and knew what eyesight was necessary and would, of all persons, best know what eyesight was left to him after his injury.

Exception 9, Page 46.

This evidence was competent as bearing upon the question

as to the attention which the defendant itself gave to these reports and the enforcement or non-enforcement of its rules which it alleged the Defendant in Error had violated. The Defendant in Error was showing that the so-called reports were matter of unenforced or abandoned form. The Plaintiff in Error was attempting to show that if the absence of the guard glass had been noted on the work reports it would have been replaced and the plaintiff, on the contrary, was, by this evidence, meeting this proposition by showing that they did not comply with the work reports which were turned in.

Exceptions 10, 11 and 12, Pages 46 and 47.

These matters clearly related to the interpretation of technical rules. The question as to what was a *repair* and what was a *supply* was a technical question which the jury were entitled to hear testimony about from those acquainted with the facts. Moreover, the Plaintiff in Error introduced no printed rule that was at variance with this proof. Even if there had been such a rule, it was permissible for the Defendant in Error to show it had been abrogated or changed or modified by custom permitted by the Plaintiff in Error, and this was the purport of the testimony covered by these exceptions.

Exception 13, Page 47.

The Plaintiff in Error is here so manifestly putting a strained interpretation upon the language of his Honor, and so limited an interpretation upon the testimony of the witness referred to by his Honor, that the exception hardly needs argument. The plain import of the witness's testimony as set out on page forty-three in connection therewith is to the effect stated by his Honor. Moreover, it does not appear that all of the evidence is in the printed record and the presumption is that his Honor correctly stated what the evidence was.

An examination of the context where this exception is noted and the evidence to which it refers is sufficient answer to the exception.

Exception 23, Page 69.

This question was asked by the Plaintiff in Error to its own witness and was in its nature both a cross-examination and leading, and was very properly excluded by his Honor as incompetent for these reasons and other apparent reasons.

Exception 31, Page 107.

The Plaintiff in Error bases its objection to this testimony upon the proposition that "Dr. Goodwin knew nothing whatever about the duties of an engineer and the requirements as to sight." There is no evidence whatsoever upon which to base this statement of Plaintiff in Error, and there is no foundation for the exception.

Exception 35, Page 113.

This was in response to testimony from the Plaintiff in Error's witness Wright and others, about their having run with the water glass exposed (e. g., pages 72 and 73. Evidence of Dave Campbell, page 75 and 76). The custom and practice of the Plaintiff in Error, through its engineers, had been testified about and we think the testimony of this engineer, Ernest Horton, that he ran his engine in the Seaboard employ for four years and never shut the glass off was competent. Moreover, the Judge at once reformed the inquiry and had an answer given directly as to the opinion of the witness (page 113 of the record), and this would have made the first answer competent as in corroboration or, if not, it would have made it harmless.

The Plaintiff in Error had elicited from its witness, J. B. Pendleton, the testimony to the effect that he had run his

engine in the employ of the Plaintiff in error for fifteen years without a water glass (presumably using a gauge cock), and the Defendant in Error should certainly have been allowed to show permitted usage to the contrary.

The Plaintiff in Error's contention that this witness did not qualify as an expert hardly needs notice, as the merest examination of his testimony shows his long experience and expertness as an engineer. He worked with the Seaboard seven or eight or nine years (page 113), and was afterwards, and at the time of his testifying, an engineer on the Atlantic Coast Line (page 112).

Exception 44, Page 132.

This instruction was substantially given by his Honor in his very able charge, which charge was as favorable as Plaintiff in Error could have hoped for, and we are content in answer to this exception simply to refer to his Honor's charge as printed in the record.

Exception 51, Page 139.

As answer to this exception we simply refer to his Honor's charge.

Exception 62, Page 146.

The charge here complained of was more favorable to the Plaintiff in Error than it would have been if the language had been used which the Plaintiff in Error suggests. That is to say: If his Honor had used the conjunctive particle "and" instead of the disjunctive particle "or," he would have placed a greater burden upon the Plaintiff in Error than he did place and greater than the law places.

Exception 69, Page 153.

The first sentence in this exception, pages 32 and 33 of the

brief, is simply a recital of the general rule for damages which has been approved by this Court. The next sentence takes up the application of the rule to this case and is not an additional statement of damages but is an explanatory statement of the rule. It will be noticed that the first two clauses in the second sentence refer to matters they may consider, to wit: (1) Bodily pain and suffering, (2) Permanent disability, and afterwards his Honor stated (3) Any other facts which in their sound discretion should be added to make compensation for the injury that are purely and plainly the consequences of the injury complained of.

Exception 45, Page 133.

The prayer uses at the end of it the general term "to continue in the employment," and his Honor simply explained that by giving it a more particular meaning by saying "continued to use the engine," and brought in the condition always held to be essential, to wit, *reliance on the promise*. Certainly his Honor, by this, made the prayer better law.

Exceptions 53, 54, 55, 57, 58, Pages 141 and 144.

We do not need to cite authorities to support this portion of his Honor's charge. It is in direct keeping with the language of this Court itself in numerous cases and will be recognized by the Court as the approved language relating to contributory negligence.

Exceptions 59, 60, 61, 62 and 63, Pages 145 and 146.

We hardly see how the Plaintiff in Error can be heard to complain that in this action the decision of the Supreme Court of the United States is not good law.

Exception 75.

The disallowance of the Plaintiff in Error's motion for a

new trial for newly discovered evidence was discretionary with the Judge and he did not waive that discretionary power on his part. He did state that, in his opinion, the proposed newly discovered evidence, if true, was merely cumulative and he disallowed the motion. He did not limit his action to any one ground, but he was right in his opinion, because the Plaintiff in Error had offered considerable evidence through Edgar W. Barbee, page 80 of the record; Dr. K. P. Battle, page 93 of the record, and Dr. R. H. Lewis, page 98 of the record, and A. E. Hopkins, page 86 of the record, to the effect that the Defendant in Error, prior to the injury complained of, had an old scar upon his right eye. It was immaterial as to how the scar was caused. The pregnant fact was that the scar was there and that fact had been fully developed before the jury.

Upon the whole record we respectfully submit that the Plaintiff in Error had a full and fair trial of its rights in this matter. The case was tried before the presiding Judge, whose opinion, as shown by the record, at the first trial of this action, was favorable to the Plaintiff in Error's position, and his rulings were as fair as the Plaintiff in Error could hope for, and his charge was elaborate and delivered with his customary care and clearness and with the decision of this Court and of the Supreme Court of the United States rendered in this very cause before him, and we respectfully submit that his action in the premises leaves no just cause whereof the Plaintiff in Error may complain.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

that the danger was so imminent that no ordinarily prudent man would continue the employment in reliance on the promise and that one so continuing did assume the risk.

Reasonable reliance by an employé on a promise of reparation and continuance in his employment for a reasonable period pending performance cannot be regarded as contributory negligence as matter of law; the request and direction of the employer has a material bearing on the question; and so *held* in this case that the question was properly submitted to the jury.

Authorities differ, and not yet decided by this court in this or prior cases, as to whether continuing the employment in presence of danger so imminent that no ordinarily prudent man would confront it, even where the employer has promised reparation, amounts to assumption of risk or contributory negligence.

Distinctions between assumption of risk and contributory negligence which were of little consequence when both led to the same result become more important in cases under the Employers' Liability Act where the former is a complete bar, and the latter merely mitigates the damages.

Whether continuing to use one defective apparatus instead of another apparatus amounted to proximate cause of injury, is at most a question for the jury if it be shown that the latter was not a safe instrumentality.

85 S. E. Rep. 218, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. Murray Allen for plaintiff in error.

Mr. Clyde A. Douglass, with whom *Mr. William C. Douglass* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action, based upon the Federal Employers' Liability Act (35 Stat. 65, c. 149; 36 Stat. 291, ch. 143), was under consideration on a former occasion, when a judgment in favor of defendant in error was reversed and the cause remanded for further proceedings. 233 U. S. 492. There was a new trial, and the resulting judgment in favor

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of Horton, the employé, having been affirmed by the Supreme Court of North Carolina (85 S. E. Rep. 218), the case is brought here again, with numerous assignments of error, of which, however, only a few need be noticed.

Plaintiff was injured while in the employ of defendant in interstate commerce. He was an experienced locomotive engineer, and was so employed when injured. His engine was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame inclosing a glass tube 12 or 14 inches long, and $\frac{1}{2}$ inch in diameter, the glass being about $\frac{3}{8}$ inch thick. The tube was placed vertically, and was connected with the boiler above and below, so that it received water and steam direct from the boiler and under a pressure of 200 pounds. In order to protect the engineer and fireman from injury in case of the bursting of the tube, a thick piece of plain glass, known as a guard-glass, should have been in position in slots arranged for the purpose in front of the water tube. Plaintiff took charge of the engine in question on July 27 or 28, 1910, and noticed at that time that the guard-glass was missing. He reported this to a round-house foreman, to whom such report should properly be made, and asked for a new guard-glass. The foreman replied that he had none in stock, but would send for one, and that plaintiff in the meantime should run the engine without one. He did so for about a week, and until August 4, when the water tube exploded, and the flying glass struck him in the face, causing the injuries upon which the action was grounded.

The principal insistence of defendant (plaintiff in error) is that upon all the evidence plaintiff, as a matter of law, assumed the risk of injury arising from the absence of the guard-glass. The rule applicable to the situation was expressed by this court upon the former review of the case, in the following terms (233 U. S. 504): "When the

employé does know of the defect [arising from the employer's negligence], and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

By motions for non-suit and for dismissal of the action, and by various requests for instructions to the jury, all of which were refused, defendant raised the point that although plaintiff reported the absence of the guard-glass to defendant's foreman and received a promise of repair, yet the danger was so imminent that no ordinarily prudent man under the circumstances would have relied upon the promise, and hence plaintiff, as matter of law, assumed the risk of injury.

But we do not think it can be said as matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard-glass to prevent the bursting of the water tube, but only to limit the effect of such an explosion in case it happened to occur. That there was a constant danger that the tube might explode was abundantly proved, and was admitted by plaintiff. But the tube was designed to withstand the pressure of 200 pounds, and ordinarily did so. It was its proper function to do so. One witness said: "They may last a day, a week, a month, or a year, or it may last an hour, or shorter." The jury

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might reasonably believe that such a water-glass would probably not explode in the ordinary use of it unless it was imperfect or defective in some respect other than the absence of the guard-glass, and that, since there was no evidence of this, Horton was justified in assuming that the danger of an explosion was not immediately threatening.

There is a substantial difference in the attitude of the employé towards the known dangers arising out of defects attributable to the employer's negligence, depending upon whether there has or has not been a promise of repair. It was clearly expressed in a well-reasoned opinion by the Supreme Court of New Jersey (*Dowd v. Erie R. R. Co.*, 70 N. J. L. 451, 455) thus: "To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. . . . The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle *volenti non fit injuria*. But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk."

To relieve the employer from responsibility for injuries that may befall the employé while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employé that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise. The danger of the explosion of the water-glass, which normally should withstand the pressure to which it was subjected

but which might probably explode at some time near or remote, cannot be said, as matter of law, to have been so imminent as to import an assumption of the risk by Horton notwithstanding the employer's promise to replace the guard-glass. It would require a much plainer case than this to justify taking the question from the jury.

It is insisted that the trial court erred in refusing to instruct the jury that plaintiff was guilty of contributory negligence as a matter of law. This, also, is based upon the ground of the obvious and imminent nature of the danger to plaintiff arising out of the absence of the guard-glass. But the reasonable reliance of the employé upon the employer's promise to repair the defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed. The employer's direction or request that the employé remain at work pending performance of the promise has a material bearing upon the employé's duty in the meantime, and therefore upon the question of his negligence, which involves the notion of some fault or breach of duty on his part. *Seaboard Air Line v. Horton*, 233 U. S. 492, 503. Hence, the question of Horton's contributory negligence was at best a matter for the jury to determine.

All the disputable questions of fact were submitted to the jury under instructions that were sufficiently favorable to defendant. The jury were told, in substance, that if they found the absence of the guard-glass was known to plaintiff, and he reported the defect and was given a promise to repair, and if he knew and appreciated the danger incident thereto, and the danger was so obvious that a man of ordinary prudence would not have continued to use the water-gauge without the guard-glass, then the plaintiff assumed the risk. This was unduly favorable to defendant, in that it omitted to state that in order to qualify plaintiff's right to rely upon the

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promise of reparation the danger must be imminent as well as obvious. But, besides this, we deem it proper to say, in view of the fact that the instruction referred to seems to have been intended to conform to our opinion delivered upon the former writ of error, that we did not then intend to decide whether an employé remaining at work in reliance upon the employer's promise to repair a defective appliance, but where the danger known is so imminent that no ordinarily prudent man under the circumstances would remain at work in reliance upon the promise, should be held to assume the risk, or, rather, to be guilty of contributory negligence. What we said was that the employé, in the situation described, "does not assume the risk unless, at least, the danger be so imminent," etc. While most courts agree that an employé cannot, without impairing his right to recover from the employer, remain at work in the presence of a known danger so imminent that no reasonably prudent man would confront it, even where the employer has promised reparation, they differ as to whether this is to be placed upon the ground of assumption of risk or of contributory negligence. See *Hough v. Railway Co.*, 100 U. S. 213, 224, 225; *Dowd v. Erie R. R.*, 70 N. J. L. 451, 456; *Clarke v. Holmes*, 7 Hurl. & Norm. 937, 945. The distinction, which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal Employers' Liability Act, which in ordinary cases recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages, as was pointed out when the case was here before. *Seaboard Air Line v. Horton*, 233 U. S. 492, 503. The disputable point above referred to was not then presented for decision. Nor is it now presented, for upon the last trial the court, in the instruction given to the jury, put the plaintiff (upon the hypothesis of his per-

sisting in the face of an imminent danger, where a man of ordinary prudence would not) in the position of assuming the risk—a position more favorable to defendant (plaintiff in error) than that of contributory negligence.

It is further argued that Horton's own conduct in using the Buckner gauge without the guard-glass, when he could have cut this off and used the gauge-cocks, said to be an entirely safe instrumentality, was unquestionably the proximate cause of his injury. But there was evidence to show that the gauge-cocks themselves were not a safe instrumentality, because of their liability to become clogged. Hence, at the utmost, there was here no more than a question for the jury.

Other points are raised, but they are quite unsubstantial, and require no particular mention.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY *v.* HORTON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

No. 541. Argued November 30, December 1, 1915.—Decided January 10, 1916.

An employé who knows of a defect arising from the employer's negligence and appreciates the risk attributable thereto and continues in the employment without objection or promise of reparation, assumes the risk notwithstanding it arises from the employer's breach of duty. *Seaboard Air Line v. Horton*, 233 U. S. 504.

Where the employer promises reparation of such a defect and the employé relying on such promise continues, he does not, during such time as is reasonably required for its fulfilment, assume the risk unless at least the danger is so imminent that no ordinarily prudent man would, under the circumstances, rely upon such a promise. *Id.*

Where, as in the present case, the injury was caused by the absence of a glass protector in front of a water gauge which burst, and the employé had continued after knowledge and promise of reparation, *held* that the trial court did not err in refusing to hold as matter of law